Supreme Court, U. S.
FILED
FEB 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. .....

76-1060

WESTERN GILLETTE, INC.,
Petitioner,

vs.

OLIVER I. SABALA, Individually and on Behalf of All Others Similarly Situated, and LEONARD M. RAMIREZ,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

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October Term, 1976
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WESTERN GILLETTE, INC.,

Petitioner,

vs.

OLIVER I. SABALA, Individually and on Behalf of All Others Similarly Situated, and LEONARD M. RAMIREZ,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner, Western Gillette, Inc. ["Western"][1] respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above consolidated cases on August 4, 1975 and with respect to which a Petition for Rehearing and Suggestion for Rehearing in Banc, timely filed by Western, were denied by said Court of Appeals for the Fifth Circuit on November 16, 1976.

Petitions for writs of certiorari to review said judgments of the Court of Appeals for the Fifth Circuit have also been filed with this Court by the other

[1]Brackets indicate abbreviations adopted for brevity in the petition.

defendants in this action—*International Brotherhood of Teamsters v. Sabala* (No. 75-788; October Term, 1975) and in *Teamster Local No. 988 v. Sabala* (No. 75-781; October Term, 1975). Said petitions at the date hereof are pending.

The facts of these consolidated cases and certain of the questions herein are, in important respects, similar and related to those in *Franks v. Bowman Transportation Co.* (No. 74-728; October Term, 1974; petition for writ of certiorari granted March 24, 1975); *International Brotherhood of Teamsters v. United States of America* (No. 75-626; October Term, 1975; petition for writ of certiorari granted May 24, 1976); *T.I.M.E.-DC, Inc. v. United States of America* (No. 75-672; October Term, 1975; petition for writ of certiorari granted May 24, 1976); *Southern Conference of Teamsters v. Rodriguez* (No. 75-715; October Term, 1975; petition for writ of certiorari granted March 24, 1976); and *East Texas Motor Freight System, Inc. v. Rodriguez* (No. 75-718; October Term, 1975; petition for writ of certiorari granted May 24, 1976). All of the foregoing cases, except *Franks,* are now pending before this Court.

Opinions Below.

The Opinion of the Court of Appeals is reported at 516 F.2d 1251 (5th Cir. 1975). Said Opinion and the Judgment of the Court of Appeals (unreported) are reproduced in the Appendix as Appendices A (pp. A-1-44) and B (p. A-45) respectively. A petition for rehearing of Western, timely filed, was denied by the Court of Appeals by order (unreported) entered November 16, 1975. Copy of notice of entry of said order is reproduced as Appendix C (p. A-46).

The opinions of the Trial Court, Singleton, D.J. (USDC, S.D. Tex., Houston Div.) are reported at 362 F.Supp. 1142 and 371 F.Supp. 385. Said opinions of the District Judge are reproduced in the Appendix as Appendices D (pp. A-47-80) and E (pp. A-81-98) respectively. The Final Judgment of the District Judge (unreported) is reproduced as Appendix F (pp. A-99-101).

Jurisdiction.

The Judgment of the Court of Appeals herein was entered on August 4, 1975. As stated, petition of Western for rehearing was denied by order entered November 16, 1975. By orders dated December 2, 1976 and December 28, 1976, the Court of Appeals has stayed mandate to and including February 14, 1977 to permit Western to file the within Petition. The Court's jurisdiction is involved pursuant to 28 USC §1254(1).

Questions Presented for Review.

1.

Whether unlawful standards were used in the formulation of the "rightful place" seniority awarded the discriminatees for the purpose of remedial relief.

2.

Whether the priority granted discriminatees as to future over-the-road jobs constitutes proscribed discrimination.

3.

Whether the standards used to fix rights of discriminatees to back pay permit awards to individuals not legally entitled thereto.

4.

Whether a legally invalid formula has been used to compute the award of back pay recoverable by discriminatees.

Statutory Provisions Involved.

The statutory provisions involved are the Civil Rights Act of 1866 (42 USC §1981) and those portions of Title VII of the Civil Rights Act of 1964, as amended (42 USC §2000e *et seq.*), described below:

Section 703(a) (42 USC §2000e-2(a))

Section 706(g) (42 USC §2000e-5(g)).

42 USC §1981 and said Sections 703(a) and 706(g) are reproduced in Appendix G (pp. A-102-103).

Statement of the Case.

1. *Parties:* Western is an interstate motor carrier of property. Other defendants are the International Brotherhood of Teamsters [IBT], Southern Conference of Teamsters [Southern Conference] and Teamster Local Union No. 988 [Local 988].[2] Plaintiffs are Mexican-Americans and Blacks employed as City Drivers at Western's Houston, Texas terminal.[3] They claim in these class actions they have been discriminatorily denied transfer to jobs as Road Drivers in violation of both Title VII of the Civil Rights Act of 1964 [Title VII] and the Civil Rights Act of 1866 [Section 1981] both by overt acts and the

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[2]As noted above, these defendants [collectively the "Unions"] also have pending petitions for a writ of certiorari to the Court of Appeals in this action.

[3]City Drivers pick up, deliver and handle freight at and in the vicinity of a terminal. Road Drivers move freight "over-the-road" between terminals.

"lock-in" effect of the "dual seniority" system contained in labor contracts between Western and the Unions.

2. *The Action—Pretrial Matters:* The original complaint in the Sabala action named only Western as a defendant. On Western's motion under Rule 19 of the Federal Rules of Civil Procedure, the District Court ordered the Unions impleaded in an amended complaint as indispensable parties defendant. On motions before the trial the class was defined and the cases consolidated.[4]

A number of potential Class Plaintiffs opted out or were ordered eliminated by the District Court during the trial. In the final decision and judgment, the Trial Judge named 23 Class Plaintiffs he had found to be qualified to drive "over-the-road" during pertinent periods [Class Members].

3. *The Trial—Liability Phase:* The trial was bifurcated. The initial phase of the evidence related primarily to questions of liability. Upon completion of the liability phase the District Court issued an opinion in which it concluded that both Western and the Unions had discriminated against the Class Plaintiffs in transferring to road positions with Western.[5] Western's liability was based both on Title VII and Section 1981. The Unions were held not liable under Title VII because no charges had been made against them before the Equal Employment Opportunity Commission [EEOC] but were held liable under Section 1981. As a part

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[4]The class (including named plaintiffs) was defined by the District Court to consist of: "All Mexican Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas." (App. D., p. A-55) [Class Plaintiffs].

[5]362 F.Supp. 1142, App. D, pp. A-47-80.

of its initial decision, the District Court ordered both Western and the Unions to permit Class Plaintiffs to avail themselves of opportunities to transfer to Road Driver jobs in accordance with a described procedure (later modified), held Western and the Unions should each pay one-half of plaintiffs' attorneys' fees, and that Western alone should pay back pay to Class Plaintiffs who would have transferred to Road Driver jobs or hired on as Road Drivers absent discrimination, in an amount equal to the salary lost because of discrimination. Further proceedings were ordered to implement the relief granted.

On appeal, Western unsuccessfully urged that the District Court's initial Opinion was in error in several respects. The only findings in the initial Opinion here involved are those which relate to the remedies later awarded to Class Members.

4. *The Trial—Remedy Phase:*

Overview: Some evidence presented at the liability phase of the trial was also pertinent on the question of remedies. Proof of overt discrimination relied upon by the District Court to sustain findings of liability had related entirely to events occurring at Houston. Western proved, and the District Court found, that transfers to over-the-road jobs [Road Jobs] were allowed and occurred with some frequency at terminals in the Southern Conference Area.[6] Proof had also been presented establishing that transfers were allowed between jobs at the same terminal but that inter-job transfers to Road Jobs between terminals had been

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[6]Geographical area under the jurisdiction of the Southern Conference for labor contract purposes. As to Western, it embraced terminals in Texas, Oklahoma and at Memphis, Tennessee.

rare and allowed only if no qualified applicant could be found at the terminal where the new Road Job vacancy existed.[7] Union hiring halls at Houston and employees at Houston seeking transfer had been the primary source relied on to fill Houston job vacancies.[8]

At the remedy phase of the trial no additional evidence was offered as to where Class Members could have had Road Jobs absent discrimination. The matters given primary attention at the remedy phase of the trial were (i) the determination of a "carry-over" constructive seniority for Class Members, and (ii) determination of a formula for computation of back pay.

"*Rightful Place*": After some vacillation, the District Court ruled a "rightful place" constructive seniority would be assigned to Class Plaintiffs proved entitled thereto as of the date of the Road Job next available after their qualification as a Road Driver. Twenty-three of the then 25 remaining Class Plaintiffs were found to have been qualified as over-the-road drivers as of a date fixed for each by the Court. Setting these dates posed no problem. There was, however, a dispute between the parties as to whether driving qualification should be the sole test of a Class Member's right to participate in relief to be awarded. Western contended that to participate in relief, a Class Member must also show either that he had asked for a transfer or, if no such request was made, that his failure to ask was due to a belief that such request would be a futile gesture because of discrimination. This dispute was resolved early in the trial by a ruling

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[7]Transcript [Tr.] R802, R868; WGI Ex. 5, Pt. III.

[8]Tr. R661-662, R1209, R1243, R1256.

of the District Court that no Class Member could be asked whether he had applied for transfer, or as to his reason for not so applying if such was the fact.[9]

There was also a dispute between the parties as to the over-the-road jobs to be considered as "jobs available" for purpose of fixing "rightful place" seniority of Class Members. Western contended that on the basis of uncontradicted proof already of record, the only Road Jobs to which Class Members could have transferred absent discrimination would have been those which became available at Houston during or after 1960.[10] Class Members urged that their "rightful place" seniority should be fixed on the basis of Road Jobs available anywhere in the Southern Conference Area. The reasons given for this position did not relate to actual job availability.

All Class Members were allowed to testify whether, but for discrimination, they would have taken a Road Job anywhere in the Southern Conference Area other than Houston. Ten said they would have gone anywhere; thirteen said they would have transferred only to a Road Job at Houston. These post-litigation statements as to pre-litigation desires with respect to transfer were then used by the Court to determine "jobs available" for purposes of fixing the "rightful place" seniority dates of Class Members. The ten Class Members were assigned a "rightful place" seniority date on the basis of the next Road Job available anywhere in the South-

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[9]Tr. R229-232, R240-244. The Court of Appeals never ruled directly on Western's challenge to the validity of this ruling.

[10]Western had no Road Drivers based at Houston prior to 1960.

ern Conference Area after qualification. Those who placed a Houston-only limitation on their interest in Road Jobs were assigned "rightful place" seniority dates on the basis of the next Road Job available at Houston after qualification. Because of differences in date of hire, date of qualification and number of Road Jobs available at Houston, all Class Members would have had a later date "rightful place" seniority date than those assigned if such seniority had been predicated on "jobs available" at Houston only.

The only basis stated by the District Court for its conclusion that Road Jobs which became available at terminals in the Southern Conference Area other than Houston were to be used to determine the "carry-over" seniority of 10 of the Class Members was their testimony that they would have so transferred but for discrimination.[11] The Court of Appeals mistakenly concluded that the District Court had found the Southern Conference Area was the "universe of job opportunities" for the purpose of fixing "carry-over" constructive seniority because of "modified seniority system" provisions in the applicable Road Driver bargaining contracts.[12] In its decision the Court of Appeals found

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[11]App. E, p. A-84.

[12]The evidence shows that the terminal to which a Road Driver is first assigned in the Southern Conference Area is his home terminal while he remains in that Area, and that he accumulates job seniority in the Area based on his date of first employment there. Such seniority accumulates when he is working and when he is on layoff for lack of work there. The "modified seniority system" is simply a provision in the applicable Road Driver labor contract which allows a senior Road Driver on layoff at his home terminal to take work at another terminal then being performed by a Road Driver with less seniority during such period as the senior

(This footnote is continued on next page)

the Southern Conference Area was the proper "job opportunity universe" to be used for fixing "carry-over" seniority of the 10 Class Members, both because they had testified they were willing to take Road Jobs anywhere in that Area and because of the "modified seniority system".

A basic premise of the petitioner here is that the Courts below used legally invalid procedures for fixing "carry-over" seniority, and that because thereof, the "rightful place" seniority assigned Class Members gives them a proscribed preference.

Back Pay: It is, and has been, Western's contention that the only Class Members legally entitled to back pay are those who were discriminatorily denied transfer to an available Road Job at Houston after a request for such transfer. In its final Opinion the District Court held that a request for transfer was not a condition precedent to an award of pay and gave back pay to all Class Members who had been given a "rightful place" seniority date.[13] This ruling was foreshadowed during the trial by the holding, earlier mentioned, that Class Members could not be questioned as to whether they had asked for transfer, or why they had not.[14] The Court of Appeals affirmed the finding in the District Court's written Opinion on the basis it was a proper exercise of judicial discretion.[15]

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man continues on layoff at his home terminal. While he is at the away-terminal, the senior man continues to hold a job status in the home terminal and must return there to work on recall by the employer. "Modified seniority" does not create any jobs or change the job seniority status of anyone. All it does is reshuffle available work during periods when there is not enough of it for all regular employees to go around.

[13]App. E, p. A-91.

[14]Tr. pp. R229-232, R240-244.

[15]App. A, pp. A-33-34.

Plaintiffs and Western both called an expert witness, each of whom computed prospective back pay according to several formulas. Their difference as to the amount of back pay awardable were due more to differences in source data than to differences in method. While Western's expert was still on the stand, the District Court "cut off" further evidence as to method of computing back pay with the explanation that none of the experts' proposals was "appealing".[16] Thereupon, the Court announced that the back wages of each Class Member would be computed by applying to his actual wages a factor representing the relationship of the actual earnings of a Road Driver and of a City Driver, each of whom would be "representative" of his own work classification [Court's Formula]. Plaintiffs' expert was directed to implement the Court's Formula and present computations based thereon. Western was allowed to call a statistician for rebuttal purposes.

Neither of these experts supported the Court's Formula as a valid basis for computation of pay lost as a result of discrimination.[17] Western's statistician offered a variant of the Court's Formula which eliminated the conceptual error therein.[18] Experts notwithstanding, the Court's Formula as implemented by plaintiffs' expert was used by the District Court for computing the back pay awarded in the Final Judgment. On appeal, Western challenged the validity of the Court's Formula both on the basis of its error in concept

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[16]Tr. pp. R1143-1144.

[17]Tr. p. R1204; WGI Ex. 10-R.

[18]The conceptual error in the Court's Formula is that it does not provide a Road Driver whose earnings would be representative of those a "representative" Class Member would have had but for discrimination.

and because its implementation was based in part on legally invalid assumptions. In its decision the Court of Appeals approved the Court's Formula as an acceptable exercise of discretion but did not pass upon Western's challenges on the legal validity of said formula, either directly or indirectly.[19]

5. *The Unions' Petitions:* The Unions also have pending petitions for writs of certiorari in these cases. With one exception, those petitions are addressed to the validity of the Fifth Circuit's decision dealing with their liability. In the present posture of the cases Western considers comment here on those portions of the Unions' petitions would be inappropriate. Western does, however, wish to call to the Court's attention that the IBT and Southern Conference also challenge the legality of the "rightful place" seniority of individual Class Members and to that extent, IBT, Southern Conference and Western seek the same basic relief.

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[19]App. A, pp. A-33-34.

REASONS FOR GRANTING THE WRIT.

I.

All Issues Raised Pose Important but Unresolved Questions.

All of the questions here raised deal with the validity of relief awarded to individual plaintiffs in a private class action brought under the Civil Rights Acts of 1866 and 1964 to eliminate discrimination proscribed therein. During the eleven years since Title VII became effective, many cases arising under those acts have been initiated in the federal courts. In the nature of things, questions as to proper scope of remedies are the last to arise.

The Court has recently had before it two cases involving the problem. (*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Franks v. Bowman Transportation Co.*, ... U.S. ....., 47 L.Ed.2d 444 (1976)).[20] In both the Court has stated the basic standard of relief appropriate in this type of civil rights action. That standard, as stated in both cases, is "to make persons whole for injuries suffered on account of unlawful employment discrimination"—and that to achieve this "make whole" standard, the decree must, so far as possible, "eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[21] In *Albemarle* the Court also pointed out the necessity for a "principled application" of these standards and the importance of avoiding decisions

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[20] *Franks* and this case are alike as to basic facts in that in both the employer was an interstate trucking company, the labor contracts are essentially the same, and the pertinent employment categories are similar.

[21] *Albemarle Paper Co. v. Moody, supra*, pp. 418-419.

producing differing results for breach of a duty in situations which cannot be differentiated in policy.[22]

In both *Albemarle* and *Franks* the lower courts had denied requested relief. In *Albemarle* the relief sought was back pay; in *Franks* it was constructive seniority. In its opinion in both of those cases this Court reviewed in some detail the reasons which have been given by the lower courts for their action. In both cases orders denying relief were reversed because those reasons were found legally insufficient to warrant denial of the relief sought. *Albemarle* and *Franks* thus provide guidelines in two important areas as to the *minimum* relief legally allowable under the basic "make whole" standard.

The issue herein raised poses the question as to the *maximum* relief allowable to discriminatees in private class actions under the Civil Rights Acts in two important areas: (i) Elimination of the consequences of past discrimination; and (ii) back pay. The "important national goals" and need for "principled application of standards" which made review by this Court necessary in *Albemarle* and *Franks, supra,* are also here involved. The question of maximum legally allowable relief in civil rights cases is an important one which should be—but has not been—answered by this Court. The need for such action at an early date is emphasized by the fact that any legally excessive relief necessarily creates a proscribed racial preference.

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[22]*Supra,* p. 417.

II.

The Court of Appeals Has Sustained the Use of an Unlawful Standard in Formulation of the "Rightful Place" Seniority Awarded Class Members for Purposes of Remedial Relief.

1. The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court.

The Pertinent Decisions of this Court: As stated in Part I above, in *Albemarle* and *Franks* this Court held that the basic standard by which remedial relief in civil rights actions must be met is whether or not the discriminatees will be "made whole" from the discrimination to which they have been subjected. *Franks* holds that some form of constructive seniority—"slotting the victim of discrimination in that position in the seniority system that would have been his had he been hired at the time of his application"—is necessary to meet this "make whole" purpose.[23] *Franks* also teaches that this "rightful place" seniority is a remedy of individual application and is appropriate in this type of case.

Action of the Courts Below: The decision of the Court of Appeals affirming the award of relief granted to the individual Class Members by the District Court is in conflict with each of these determinations of this Court in several important respects.

The discrimination against which remedial relief here is directed is the failure to allow transfers of the Class Plaintiffs to positions as Road Drivers. Stating an intent to grant "rightful place" constructive relief which would make the Class Members whole, the lower

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[23] *Franks v. Bowman Transportation Co., supra,* 47 L.Ed.2d 444, 462.

Courts approved a "carry-over" seniority for them to take on transfer to Road Jobs, to be determined on the basis of (i) the date each Class Member first qualified as a Road Driver [Qualification Date], and (ii) the date next following the Qualification Date upon which a Road Job became available [Road Job Date]. As earlier noted, the parties were precluded by express rulings from developing evidence establishing that any individual Class Member was not in fact interested in transferring to a Road Job until some date after his Qualification Date.[24] All Class Members were, however, allowed to testify whether, absent discrimination, they would have been willing to take a Road Job anywhere in the Southern Conference Area other than Houston.

Applying the foregoing standards, the date discrimination began as to each Class Member was presumed to be his Qualification Date. The 10 Class Members who said they would have taken Road Jobs at terminals other than Houston were given as their Road Job seniority date the date a Road Job next became available after their Qualification Dates anywhere in the Southern Conference Area. The remaining Class Members got Road Job Seniority dates as of the next Road Job at Houston.[25] The action so taken is in conflict with *Albemarle* and *Franks* both as to determination as to when discrimination began and as to the Road Jobs which would have been available to Class Members but for discrimination.

Qualification: His Qualification Date is the earliest possible date at which any Class Plaintiff could possibly

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[24]Tr. pp. R229-232, R240-244.

[25]App. A, p. A-29.

have been the victim of discrimination.[26] The necessary effect of the action of the lower Courts is a presumption that all Class Members would have transferred to Road Jobs on their Qualification Dates. The parties were not allowed to rebut that presumption.[27] But it is rebuttable.[28] Defendants were denied the right to present such rebuttal evidence.[29]

In *Franks,* this Court held improper an order of the Fifth Circuit denying seniority to all in a class on the basis of a presumption that some in the class might not in fact have been victims of discrimination.[30] In principle, the Fifth Circuit had done the same thing here as it did in the *Franks* case. Here the Fifth Circuit has presumed discrimination began as to each Class Member on his Qualification Date and has precluded a showing that for some Class Members the discrimination in fact began later. In reversing the Fifth Circuit's action in *Franks,* this Court stated:

> "Generalizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class. Rather,

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[26]*Griggs v. Duke Power Co.,* 401 U.S. 424, at 436 (1971).

[27]Tr. pp. R229-232, R240-244.

[28]Loss of job seniority can be a deterrent for nondiscriminatory reasons. Road Drivers work mostly nights, are away from home several days each week, get no minimum weekly pay and are on duty more hours per week than City Drivers. Such factors can be a deterrent to transfer at one period in a Class Member's life and not at another. Since Western allowed transfers, and had minority Road Drivers, one or more Class Members could have failed to ask for transfer for reasons other than a belief that asking would have been futile. (Tr. pp. R973-975, R1348-1351.)

[29]Tr. pp. R240-244. Western was not even allowed to ask Class Members if they had or had not asked for transfer to Road Jobs.

[30]*Franks v. Bowman Transportation Co., supra,* p. 466.

> at such time as individual class members seek positions as OTR drivers, positions for which they are presumptively entitled to priority hiring consideration under the District Court's order, evidence that particular individuals were not in fact victims of racial discrimination will be material." (*Franks v. Bowman Transportation Co.*, ... U.S. ...., 47 L.Ed.2d 444, at 466.)

If the word "denial" is changed to "grant", the above statement fits this case exactly.

Road Job Dates: Obviously, no one can be denied a job for proscribed reasons if there is no job available.[31] Therefore, the earliest date upon which actionable injury for discrimination could have occurred as to any Class Member was that date the first Road Job became available which he was denied for discriminatory reasons.[32] In order to satisfy the basic "make whole" standard set in *Albemarle* and *Franks,* the only "job available" which can properly be used for fixing a "carry-over" constructive seniority date is the date a job first became available which a Class Member could in fact have had but for discrimination.

Class Members were City Drivers at Houston. The only overt discrimination found took place at Houston. No evidence was presented that any Class Member could have transferred to a Road Job anywhere except Houston had there been no discrimination. Notwith-

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[31]Compare: *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 at 802 (1973).

[32]For reasons already stated in the portion hereof captioned "Qualification Date", a denied available job causing actionable injury could be a job other than the first one available after the Qualification Date for an individual Class Member as to whom it could be proved discrimination did not begin until later.

standing, the Court of Appeals has approved the Southern Conference Area as the "job universe" for the purpose of fixing "carry-over" seniority of all Class Members.[33] The reasons given by the Court of Appeals in support of this extension of "job universe" were (i) the willingness of 10 of the Class Members to take jobs elsewhere, and (ii) the "modified seniority" provision of the Road Drivers' labor contract.[34] From the language used in the opinion of the Court of Appeals, it is obvious that the Court considered those reasons were, per se, a valid basis for extending the "job universe" beyond Houston. Nowhere in the opinion is there any suggestion that either of these factors vested in City Drivers at Houston a right to transfer to Road Jobs anywhere in the Southern Conference Area other than Houston.

In order to meet the "make whole" standard set in *Albemarle* and *Franks,* a "carry-over" seniority date must be a date no earlier than the date of the first job available which the discriminatee could have had absent discrimination. By using desires of Class Members, and a provision in a labor contract which would become applicable to them only after transfer, as the basis for fixing "carry-over" seniority dates of Class Members, the Court of Appeals has granted relief on the basis of factors which bear no relationship to the discrimination. As a result, the decision of the Court of Appeals as relates to assignment of "carry-

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[33]Use of available jobs other than at Houston to "slot in" the 10 Class Members who said they would go anywhere necessarily gives both them and "Houston only" Class Members a Road Job Date earlier than any would otherwise have had.

[34]Described more fully at pages 9-10 hereof, in footnote No. 12.

over" seniority on the basis of jobs available elsewhere than in Houston is in conflict with the decisions of this Court in both *Albemarle* and *Franks*.

2. The Decision of the Court of Appeals Is in Conflict With Those of Courts of Appeal in Other Circuits.

In this case the Court of Appeals for the Fifth Circuit has determined the constructive "carry-over" seniority of Class Members on the basis of a completely mechanical formula. The judicial philosophy upon which that formula is based is that the only interests to be considered are those of the discriminatees, that all Class Members should be afforded the maximum seniority legally possible, and that the forumla be applied to all Class Members uniformly. That philosophy precludes consideration either of (i) facts showing the formula to be in fact inapplicable as to any individual Class Member, or (ii) facts indicating prospective injury to or discrimination against others who are affected by the relief but not parties to the litigation.

The concepts here applied were telegraphed in earlier decisions of the Fifth Circuit.[35] They have since been applied in other cases.[36] Courts of Appeal in at least three other Circuits have adopted a philosophy and procedures in the formulation of "carry-over" seniority relief in direct conflict with that formulated and applied by the Fifth Circuit here. The cases in the Second, Sixth and Ninth Circuits specifically referred to, and a brief resume of the here pertinent holding in each

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[35]*Bing v. Roadway Express, Inc.*, 485 F.2d 441 (1973); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (1974).

[36]*Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721 (1976); *United States v. T.I.M.E.-DC, Inc.*, 517 F.2d 299 (1975) (Cert. granted May 24, 1976, No. 75-672).

with respect to "carry-over" seniority, are set forth below:

Second Circuit:

Acha v. Beame, 531 F.2d 648 (1976);

Chance v. Board of Examiners, 534 F.2d 993 (1976). In these cases it was held that "carry-over" seniority should be treated as an individual remedy. Mention was made of the danger inherent in the "group" approach of creating "super seniority" in class members with resulting "reverse discrimination".

Sixth Circuit:

Meadows v. Ford Motor Company, 510 F.2d 939 (1976) (Cert. Den. 96 S.Ct. R. 2215);

Thornton v. East Texas Motor Freight, 497 F.2d 416 (1974). In both cases the "Group" approach for fixing "carry-over" seniority was rejected. *Meadows* directed the lower court on remand to consider both the interests of displaced workers and the employer's ability to retain an experienced work force. *Thornton,* a trucking company case, rejected the "group approach" because of its failure to provide for the possibility of an individual class member who was in fact not willing to transfer on his Qualification Date. (*Supra,* p. 422.)

Ninth Circuit:

United States v. Navajo Freight Lines, Inc., 525 F.2d 1318 (1975). In *Navajo* the concept of Qualification Date as a starting point for fixing "carry-over" seniority was accepted.

> However, therein the Ninth Circuit reminded the lower court the need to consider all, not just discriminatees, are entitled to a "rightful place", mentioning specifically the need to consider the relative rights of non-involved whites who had transferred with less job seniority. (*Supra,* p. 1327).

In *Franks v. Bowman Transportation Co., supra,* this Court has resolved in favor of the other Circuits the conflict as to whether "carry-over" seniority is to be applied on an individual or a class basis.[37] Because they were not therein presented, *Franks* leaves still unresolved the conflict between the Fifth Circuit and other Circuits as to (i) whether in fashioning "carry-over" seniority relief its impact upon persons other than the Class Members should be considered, and (ii) whether the "make whole" standard requires discriminatees to be given the maximum seniority possible. Consistency in the application of "carry-over" seniority is important.[38] These remaining conflicts between the decision of the Fifth Circuit here and those of the Second, Sixth and Ninth Circuits should be resolved.

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[37]This Court was, however, careful to point out that a generalization in the statement of such relief is proper, and that the burden of proving that the generalization should not be used as to a particular individual is on the party so claiming. Petitioner has attempted, unsuccessfully, to accept that burden here.

[38]The fact that two different standards for the determination of "carry-over" seniority were applied at almost the same time with respect to employees of East Texas Motor Freight covered under a single bargaining contract is an illustration in point. (Compare: *Rodriguez, supra,* Fifth Circuit, and *Thornton, supra,* Sixth Circuit.)

III.

The Prior Right Given Class Members to All Road Jobs Anywhere in the Southern Conference Area Creates a Preference in Employment Proscribed by Title VII.

By its final order the District Court granted the Class Members the first right to *every* Road Job thereafter available anywhere in the Southern Conference Area until such time as they had all either transferred to a Road Job or waived the right to do so. The Court of Appeals affirmed.

Under Title VII the federal courts have a duty to fashion remedies which will carry out the purposes of that Act and are given broad discretion as to relief they may allow so long as it is "consistent and principled."[39] However, *Albemarle* and *Franks* also teach that the remedy must not ". . . frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[40] Briefly, it is Petitioner's position here that the grant to Class Members of the absolute right to all future Road Jobs anywhere in the Southern Conference Area frustrates both of these purposes.

From the opinion of the Court of Appeals it is apparent the sole concern of both lower Courts was relief to the Class Members. Patently, the Court of Appeals gave no consideration to the impact the grant of a monopoly to the Class Members on all future Road Jobs in the entire Southern Conference Area

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[39] *Albemarle Paper Co. v. Moody, supra,* p. 421; *Franks v. Bowman Transportation Co., supra,* 47 L.Ed.2d at 461; *McDonnell Douglas Co. v. Green,* 411 U.S. 792, at 800 (1973).

[40] *Albemarle, supra,* p. 421; *Franks, supra,* 47 L.Ed.2d at 465.

would have on the eradication of discrimination ". . . throughout the economy." The frustration of the "make whole" purpose is not so apparent, but it is there.

Assuming for argument the 10 Class Members who said they would have taken Road Jobs anywhere could have had jobs other than at Houston but for discrimination, there may be some justification for allowing them a right to participate with others in the jobs becoming available at terminals other than Houston. But when, as here, the Class Members are given the exclusive right to all future jobs at all terminals in the entire Southern Conference Area to remedy a private wrong which occurred only at Houston, the remedy ceases to be sustainable as "make whole" relief and becomes an instrument of discrimination, based on race and national origin, against the prospective transferees and new hires who would otherwise have had said jobs.

As to the 13 Class Members who said they would have taken Road Jobs only at Houston, the discriminatory effect of the order granting them preferential right to all future jobs at locations other than Houston is inevitable. On their own statements they would have taken jobs only at Houston, absent discrimination. Given a prior right to Road Jobs at Houston and "carry-over" seniority equal to that they would have had but for discrimination, the "make whole" requirements of Title VII are met as to them. By giving them also a right to jobs at other locations, the Court grants them a "super seniority". By its use they take job opportunities from others who were in no way responsible for their injury but who have a valid claim to such job opportunities because they are a part of the labor force from which those jobs would have

been filled but for the proscribed preference given the 13 Class Members by judicial decree.

The question as to whether a Court can lawfully give persons who have been discriminated against at one location the sole right to future job opportunities at another location without thereby creating proscribed "reverse discrimination" is a question of importance in relation to the purposes of Title VII which has not been, but should be, answered by this Court.

IV.

Eligibility of Class Plaintiffs for Back Pay Has Been Determined on the Basis of Invalid Standards.

1. The Decision of the Court of Appeals Is in Conflict With Decisions of Courts of Appeal in Other Circuits.

On the basis of the finding in the initial decision of discrimination against the class with respect to transfers to Road Jobs, the District Court held in its final decision that Class Plaintiffs found qualified as Road Drivers were entitled to back pay. The Court of Appeals affirmed, on the ground that the District Court's action was a proper exercise of judicial discretion.[41] Stated in general terms, the holding here is that upon proof of discrimination against a class, each member of that class able to do the denied work is entitled to back pay.

The Courts of Appeal in the Fourth and Sixth Circuits have also dealt with the question of the proper standard to be applied in determining whether individual class members are entitled to back pay upon

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[41]The reasons given for so acting by the Court of Appeals need not be discussed here because they pertain to claimed contentions of Western which Western has never in fact made.

proof of discrimination against the class as a whole.[42] In most respects the specific facts in *Hairston* and *Thornton* were much the same as those in this case. The class consisted of minority employees discriminatorily denied transfer to Road Jobs, by trucking companies party to essentially the same labor contracts as here involved. However, Western has always allowed employees to transfer between job classifications. In *Hairston* and *Thornton* the employers had a "no transfer" rule prohibiting such transfers.

In *Thornton*, the Sixth Circuit approved action of the District Court limiting the award of back pay to those members of the class qualified as Road Drivers ". . . who had indicated a desire to transfer to over-the-road positions."[43] It rejected a contention on appeal that back pay should also be allowed to class plaintiffs testifying to a current interest in Road Jobs on the ground that such statements were not reliable proof of pre-litigation intent.[44] In *Hairston*, the District Court had limited the award of back pay to class plaintiffs who had ". . . sought and been denied employment as over-the-road drivers and were admittedly qualified for that position." This District Court denied back pay to all other class plaintiffs. The Court of Appeals for the Fourth Circuit remanded, on authority of this Court in *Albemarle*,[45] leaving to the District Court the determination as to whether all class plaintiffs previously denied back pay were entitled thereto. However, in its opinion the Court of Appeals for the

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[42]*Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir., 1975); *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir., 1974).

[43]*Thornton, supra*, p. 421.

[44]*Thornton, supra*, pp. 421-22.

[45]*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Fourth Circuit did indicate factors to be considered in determining the right of an individual class member to back pay. Included among the factors mentioned were qualification, and whether the class member had ever voluntarily refused a bona fide offer to transfer. With respect to the requirement of pre-litigation expression of interest in transfer, the Court stated, "The fact that a plaintiff did not request transfer or promotion is, of course, relevant. But it is clearly not dispositive."[46] Following this statement the Court noted that on the facts proved in that case, requests for transfer would have been a futile gesture because the company had a "no transfer" policy which had been used as the basis for denial of transfer between jobs by class members.

From the foregoing it is apparent that the Courts of Appeal for the Fourth, Fifth and Sixth Circuits agree that qualification to perform the desired work is a prerequisite of an award of back pay. Beyond that point they are in disagreement as to the requirements individual class members must meet to be entitled to back pay. In this case the Fifth Circuit holds there are no requirements other than qualification. *Thornton, supra,* holds that to get back pay a class member must have indicated, at least informally, some pre-litigation interest in transfer. The Fourth Circuit takes a middle ground. Its position is that failure to "request transfer" is material but not dispositive if in the particular case such request would have been a futile gesture.

The conflict among the Fourth, Fifth and Sixth Circuits as to the prerequisites to an award of back pay raises important questions which this Court should resolve.

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[46]*Hairston v. McLean Trucking Co.,* 520 F.2d 226 (4th Cir., 1975), p. 231.

2. The Decision of the Court of Appeals That All Class Members Are Entitled to Back Pay Presents Several Important Questions Which Have Not Been, but Should Be, Settled by This Court.

In *Albemarle Paper Co. v. Moody, supra,*[47] this Court dealt with the question as to the standards to be applied by federal courts in deciding whether back pay is a kind of remedy suitable for use in a particular class action. However, as therein stated:

> "Whether a particular member of the plaintiff class should have been awarded any Back Pay and, if so, how much, are questions not involved in this review."[48]

Those questions are presented in this and the next following issue herein raised.

In this case all Class Plaintiffs found qualified as Road Drivers (*i.e.*, "Class Members") were awarded back pay. At the liability phase of the trial, six of them had testified they had either asked for or inquired about transfer to Road Jobs.[49] All Class Members testified at the remedy phase of the trial that they would have taken a road job. As has been elsewhere noted, at an early stage of the remedy trial the District Court ruled that no inquiry would be allowed as to whether Class Members had asked to transfer to Road Jobs or as to their reasons for not doing so,

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[47]422 U.S. 405.

[48]*Albemarle, supra,* p. 413.

[49]Since semantics may have affected decision in the Court of Appeals, it should be stated here that "asked", "application", "inquired", "requested" and synonyms are used herein to describe any kind of pretrial communication to the employer of an interest in transfer and not, as the Court of Appeals mistakenly assumed, as reference to a "formal application for" such a position.

if such was the fact.[50] In its final Opinion the District Court held it was not necessary for a Class Plaintiff "to apply" for a Road Driver position as a prerequisite to an award of back pay.[51]

The Court of Appeals affirmed. In so doing it stated that proof an individual Class Member had applied for transfer could not be made a condition of an award of back pay because it could be presumed from the fact of discrimination against the class that such request would have been futile.[52] It did not pass on the contention made by Western that defendants should have been allowed, if they could, to prove that silence of an individual Class Member during the period of discrimination was due to lack of interest in transferring rather than "futility".

The first and maybe the most important question posed by the standard used by the lower Courts to determine back pay entitlement is whether the potential for fraudulent misuse of the Civil Rights Acts implicit therein requires its rejection as a matter of both public and judicial policy. As noted by the Court of Appeals for the Sixth Circuit in *Thornton:*

> ". . . the prospect of a large back pay award invalidates present intention as an accurate indication of past intention. An employee who may not have wanted on-the-road in the late 1960's because of the increased hours of work and the

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[50]Tr. pp. R231-32, R240-44.

[51]The evidentiary ruling above mentioned and the fact that neither the initial nor final decision made mention of "futility" suggest the District Court felt communication to the employer of an interest in transfer was simply not material at all to the issue of right to back pay.

[52]App. A, pp. A-13-14.

> time away from home might well change his mind now if the prospect of a large back pay windfall is present." (*Supra*, p. 422).

This potential for fraudulent use of the Civil Rights Acts expressed by the Sixth Circuit in *Thornton* is compounded by the fact that under the rule here announced, parties are precluded from disproving either the truth of the post-litigation declarations of past interest or the presumption of "futility" the Court of Appeals says must explain the silence of all Class Members who failed to convey that interest to their employer. A rule which necessarily produces such results requires, at the very least, the review essential to determine whether, as a matter of law, it runs counter to the basic purposes of the Civil Rights Acts and frustrates the fair administration of justice.

A second important issue posed by the order of the lower Courts is that it makes back pay a "class" rather than an "individual" remedy. All Class Members get back pay solely on the basis of a presumption that proof of discrimination against the class necessarily motivated the silence of those who did not speak out in their own behalf. *Albemarle* and *Franks* are both authority that the right to relief of members of a class must be determined upon an individual rather than a class basis.

Another important question here raised is whether the basis used to fix the right of Class Members to back pay is legally deficient for failure to include all factors necessary to establish the existence of individual injury. In *McDonnell Douglas Corp. v. Green, supra*, this Court held that in order for discrimination to cause actionable injury in an individual action, three

factors must coexist: (i) qualification, (ii) an "application";[53] and (iii) an available job denied for discriminatory reasons. *Albemarle* makes clear that back pay in a private class action is a form of individual relief. It also holds that the purpose of back pay is to make the discriminatee whole for injuries suffered as a result of discrimination. Logic suggests that since back pay compensates both an individual plaintiff and an individual class plaintiff for the same injury, elements deemed essential in *McDonnell Douglas* to establish right of recovery in the individual action should also be required to establish each individual class plaintiff's right to back pay as relief in a private class action.[54]

As the foregoing illustrations show, the decision of the Court of Appeals in this case spawns many important questions on the subject of the right of individual class plaintiffs to an award of back pay. Petitioner respectfully submits that those questions have not been —but should be—settled by this Court.

V.

The Formula Approved by the Court Below for Computation of Back Pay Due Class Members Is Invalid as a Matter of Law.

The formula used for computation of back pay was devised by the District Court. There are deficiencies in the formula which preclude its use for computation of back pay in any case arising under Title VII as a matter of law.

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[53]In the context of this case, the term refers to communication to the employer of a desire to transfer, made either formally or informally.

[54]The statement should not be construed as a contention that the burden of proof should necessarily be the same in both situations.

The legal defect in the formula is that it does not—and cannot—measure the amount which will make any of the Class Members "whole" for the loss of back pay suffered as the result of discrimination. This defect in the formula and why it should be of concern to this Court can probably be most easily demonstrated in terms of its actual application.

Briefly, the Court's Formula calls for identification of a "representative" Class Plaintiff and a "representative" Road Driver, a comparison of the earnings of these individuals, and the use of the figure resulting as a factor to fix the amount of pay Class Members presumably lost as the result of discrimination. The fatal defect in the concept of the Court's Formula is in the first step. The nub of the defect is that although each "representative" selected may be typical of his own peer group, neither is "representative" of anything pertinent to the determination of the amount of back pay lost as the result of discrimination.

Under the Court's instructions, Class Plaintiffs constituted one peer group. His instructions did not identify those who would constitute the other "universe" except that they should be "Road Drivers". The expert charged with implementation of the Formula selected as the Road Driver "universe" those Road Drivers who were working for Western in the Southern Conference Area on August 4, 1973, with seniority dates as Road Drivers on or after May 31, 1973.[55] Identification of the

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[55]August 4, 1973 has no significance in the action. It is simply the last date for which earnings data were available at the time a computer printout was prepared for the purpose of supplying plaintiffs with information they had requested in the interim between the liability and remedy phases of the trial as to the earnings of Road Drivers then currently employed by Western.

"representative" Class Plaintiff was accomplished by averaging seniority dates of all Class Plaintiffs and selecting the one among the several whose actual seniority date approximated the average and who seemed to be the "best fitted" on the basis of earnings and work habits. The same procedure was followed for identifying the "representative" individual Road Driver in the Road Driver "universe" selected.

After this identification, the percentage relationship of the earnings of these two "representative" individuals during the period the Court was allowing back pay [Back Pay Period][56] was determined. The resulting figure was used as a factor, to be applied to the total earnings of each Class Member during the Back Pay Period on the premise that the figures resulting would be the earnings he would have had as a Road Driver but for discrimination. The difference between these actual and projected earnings determined his back pay award.

Class Member E. Williams, City Driver seniority date 3/28/66, was the individual found "representative" of the Class Plaintiffs. A man named Cypert, Road Driver seniority date 5/10/65, was found "representative" of the "universe" Road Drivers. Comparison of their earnings during the Back Pay Period shows that Cypert's earnings were 1.56 times those of Williams. All that figure shows is the relationship of Cypert's earnings as a Road Driver with a 5/10/65 seniority date to those of Williams as a City Driver with a 3/28/66 seniority date. Obviously, this fact proves nothing with respect to the amount Williams

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[56]The period was from June, 1968 through July, 1973, inclusive.

should get as wages lost due to discrimination. Accordingly, if there is any here pertinent "representative" relationship between these two men it must arise from something other than the fact that each happens to have acceptable work habits and a seniority date approximating the average of all in his own individual peer group.

An available job is the *sine qua non* of actionable discrimination. But Cypert went to work as a Road Driver 10 months before Williams was hired as a City Driver. Patently, Cypert's Road Job could not have been the one discriminatorily denied Williams. Because the District Court rejected "hire date" in favor of the "first job available" test for fixing "rightful place", Williams' seniority date (hire date) as a City Driver has no significance for purposes of computing back pay. Under the circumstances, neither man's seniority date is meaningful for the purpose of determining how much back pay Williams lost because he was discriminatorily denied a Road Job.

No "representative" relationship can possibly exist between Cypert and Williams based on Williams' actual date of injury from discrimination as fixed by the District Court. Both for "rightful place" seniority and back pay purposes, the date taken as the date Class Members were discriminatorily denied a Road Job was fixed by the District Court as the next date after Qualification Date upon which a Road Job became available. That finding, right or wrong, cannot be

ignored in determining the legal validity of the Court's Formula as the basis for "make whole" relief. By coincidence, Williams was one of the Class Members who was not qualified as a Road Driver on his date of hire. By stipulation, his Qualification Date was fixed as 3/28/69. The next Road Job thereafter he could have taken became available on 6/7/70. Nearly every judicial determination which has been made in this case is based on the premise that seniority is worth money. If any of those determinations are valid, it must necessarily follow that it is legally improper to base the estimated earnings of a Road Driver with 6/7/70 seniority with those of a Road Driver with a seniority date five years greater.[57]

The foregoing explanations may be somewhat tedious. However, they demonstrate beyond any possibility of doubt that there is no way, either in theory or in fact, that a comparison of Cypert's earnings as a Road Driver during the Back Pay Period with those of Williams as a City Driver in the same period can be of any help in answering the question as to how much pay Williams lost because he was discriminatorily denied a Road Job. Since the comparisons used as the basis of the Court's Formula are useless to prove Williams' own case, they are necessarily equally invalid

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[57]Court's Exhibit 1 used to develop the Court's Formula shows that if Williams had in fact transferred to the job from which the Court found, for purposes of remedy, he was discriminatorily denied, his earnings as a Road Driver in the Back Pay Period would have been *less* as a Road Driver than they were during the same period as a City Driver. (Court's Ex. 1; Final Judgment [App. F, p. A-100].)

as a basis of computation of back pay for the other Class Members.

Under Title VII, back pay is a "make whole" remedy.[58] The injury which triggers a right to back pay is the discriminatory denial of work.[59] Accordingly, any formula to be used for the development of constructive "but for" earnings must have built into it something which necessarily relates the end product to the discriminatory act creating the injury. Further, that end product must be demonstrably reasonably close to what the discriminatee would actually have earned "but for" the discrimination. As above demonstrated, the Court's Formula is fatally defective on both counts. No question of judicial discretion is involved. The defects in the Formula make its use legally impermissible.

The principle, the decision of the Court of Appeals approving use of the Court's Formula is in conflict with decisions of this Court. The Petition should be allowed on the issue for that reason.

Conclusion.

By its decision in this case on the issues here raised, the Court of Appeals raises the fundamental and important question as to what are the maximum limits of power vested in federal courts with respect to the relief allowable to discriminatees in a private class action brought under the Civil Rights Acts. In some respects the Court of Appeals has passed beyond limits already fixed by this Court. In other areas its judgments with respect to those limits conflict with and go beyond

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[58] *Albermarle Paper Co. v. Moody, supra,* p. 419.

[59] Compare: *McDonnell Douglas Corp v. Green, supra,* p. 802.

limits set by Courts of Appeal in other Circuits on the same matters. In most areas, the Court of Appeals pioneers new ground, posing, as it does so, important questions which should be—but have not been—settled by this Court. For all of the reasons herein set forth, Petitioner requests this Petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

(516 F2 1251)

Oliver I. Sabala, Individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellee-Cross-Appellant, v. Western Gillette, Inc., et al., Defendants-Appellants-Cross-Appellees.

Leonard M. Ramirez, Plaintiff-Appellee, v. Western Gillette, Inc., et al., Defendants-Appellants. No. 74-2711.

United States Court of Appeals, Fifth Circuit, Aug. 4, 1975.

Consolidated actions were brought by black and Mexican-American employees who claimed that the existence of a dual seniority system locked in the effect of past discriminatory employment practices. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., found that the employment practices were discriminatory and perpetuated the effects of past discrimination, 362 F.Supp. 1142, and awarded back pay and rightful place seniority relief to the individual discriminatees, 371 F.Supp. 385. Plaintiffs, employer and unions appealed. The Court of Appeals, Wisdom, Circuit Judge, held that the district court's findings that the employer discriminated against members of the plaintiff class by denying them the opportunity to transfer from "city" truck-driving jobs to "road" jobs and that the continued maintenance of a dual seniority system perpetuated past discrimination were not clearly erroneous; that the district court's finding of union participation in discrimination were not clearly erroneous; that the district court did not err in refusing to condition back pay relief on a discriminatee's having made formal application for "road"

job; that the union could be held liable for back pay; that to recover attorney's fees under Civil Rights Act of 1871, plaintiffs were required to depend on one of the traditional exceptions to the general rule disallowing attorney's fees; and that the district court's statement of reasons supporting the amount of attorneys' fees award was inadequate.

Affirmed in part, reversed in part and remanded.

1. *Civil Rights Key 38*

Filing of Equal Employment Opportunity Commission charges was not condition precedent to employment discrimination suit under Civil Rights Act of 1871. 42 U.S.C.A. § 1981.

2. *Courts Key 406.3(20)*

In action by black and Mexican-American "city" truck drivers against employer and union alleging that existence of dual seniority system for "city" and "road" drivers locked in effect of past discriminatory employment practices, district court's findings that employer discriminated against members of the plaintiff class by denying them the opportunity to transfer from "city" to "road" jobs and that dual seniority system perpetuated past discrimination were not clearly erroneous. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. *Civil Rights Key 9.10*

General decline of business with its concomitant effects on employment magnifies rather than lessens need for strict compliance with requirements of federal Civil Rights Acts. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. *Civil Rights Key 38*

Discriminatory intent is not essential element of employment discrimination action. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. *Civil Rights Key 44(1)*

In employment discrimination action, pattern of past discriminatory hiring may be established by statistical evidence in conjunction with other evidence or by statistical evidence alone. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. *Civil Rights Key 46*

Where existence of dual seniority system for "city" and "road" truck drivers locked in effect of past discriminatory employment practices in denying minority drivers more lucrative "road" positions, district court's utilization of modified seniority system whereby road drivers from one terminal were able to "bump" drivers with less seniority at another terminal in its determination of rightful place seniority dates for discriminatees was not abuse of discretion. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. *Courts Key 406.3(20)*

In action by black and Mexican-American "city" truck drivers against employer and union alleging that existence of dual seniority system for "city" and "road" drivers locked in effect of past discriminatory employment practices, district court's finding that local, regional and national unions participated in discrimination was not clearly erroneous, even though local union

actively petitioned national bargaining committee to merge separate seniority systems. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. *Civil Rights Key 46*

Where dual seniority system operated to lock in effect of past discrimination in failing to allow minority "city" truck drivers to transfer to "road" driver positions, and employer had filled whatever vacancies existed in "road" positions with white drivers who were allowed to "force-on," district court properly awarded discriminatees back pay without regard to whether individual discriminatee actually made inquiries about possibility of transfer to "road" jobs. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. *Civil Rights Key 46*

Where district court determined that dual seniority system operated to lock in effect of past discrimination in failing to allow minority "city" truck drivers to transfer to "road" driver positions, district court did not abuse its discretion in calculating back pay relief on basis of what a representative "road" driver and a representative "city" driver earned. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. *Civil Rights Key* 46

Where district court determined that dual seniority system operated to lock in effect of past discrimination in failing to allow minority "city" truck drivers to transfer to "road" driver positions, district court did not abuse its discretion in allowing back pay relief

only until date of its first order rather than extending such relief to date that each individual discriminatee achieved "road" driver status. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000 et seq.

11. *Civil Rights Key 46*

Where district court determined that dual seniority system operated to lock in effect of past discrimination in failing to allow "city" truck drivers to transfer to "road" driver positions, awarded back pay relief to date of its first order, and retained jurisdiction for one year to evaluate employer's efforts in remedying discrimination and to order further relief if necessary, district court should have retained jurisdiction for such further time as might be necessary to carry out that further relief. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. *Civil Rights Key 46*

Where union was found partially liable for maintenance of dual seniority system which locked in effect of past discrimination, union as well as employer was subject to back pay award. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

13. *Civil Rights Key 46*

Employment discrimination plaintiffs under Civil Rights Act of 1871 were required to depend on one of the traditional exceptions to general rule disallowing attorneys' fees if they were to recover such fees. 42 U.S.C.A. § 1981.

14. *Federal Civil Procedure Key 2737*

District court order basing award of attorneys' fees on finding that amounts were reasonable under circumstances in light of time spent in preparation of litigation of cause, complexity of such preparation and litigation and novelty of issues was inadequate to facilitate meaningful appellate review of award.

Appeals from the United States District Court for the Southern District of Texas.

Before Wisdom, Simpson and Roney, Circuit Judges.

Wisdom, Circuit Judge:

This title VII—Section 1981[1] employment discrimination class action[2] involves facially neutral seniority systems in a trucking company employing city drivers and road drivers.

Western Gillette, Inc., a nation-wide trucking company, employs Oliver Sabala, a Mexican-American, as a city driver at its Houston terminal. Sabala brings this action on behalf of all Mexican-Americans and blacks employed as city drivers at the Houston terminal. He attacks the separate seniority systems established for city and road drivers under the Company's collective bargaining agreement. Sabala contends that the facially neutral practices of maintaining separate lines of progression for road and city drivers, and

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[1]42 U.S.C. § 2000e *et seq.*; 42 U.S.C. § 1981.

[2]Initially, two suits were brought and consolidated in the district court. Oliver Sabala brought suit individually and on behalf of all others similarly situated in Sabala v. Western Gillette, No. 71-H-961. Leonard Ramirez brought suit individually in Ramirez v. Western Gillette, No. 71-H-1338. The issues are substantially the same on appeal, and Ramirez has filed no brief in this Court. References to Sabala hereafter will be used to designate the appellees.

of requiring city drivers to forfeit their job seniority to transfer from city to road jobs, effectively lock minority employees into the lower-paying city jobs. These practices, Sabala contends, perpetuate the effects of past racial discrimination in that they prevent minority drivers, historically relegated to the less desirable city jobs, from moving to the road. We have previously considered the discriminatory effect of these "ubiquitous practices in the trucking industry" in the Rodriguez trilogy.[3] See Rodriguez v. East Texas Motor Freight,

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[3]We have previously noted the effect of these practices in the trucking industry:

> As the federal courts have thus become familiar with the practices in the trucking industry, a clear pattern has emerged: throughout much of the industry, trucking companies, and the unions representing drivers, have erected barriers to the movement of non-white/non-Anglo workers from pickup and delivery jobs to the coveted road driver positions. The employment practices attacked in this suit—the no-transfer and seniority policies—are prevalent in the trucking industry. Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they are not generally permitted to carry over their seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively "locked in" their city driving jobs with no realistic possibility of transferring to line driving positions. Were there no more to the scenario, of course, the federal courts would likely have no concern; there is nothing per se illegal in no-transfer or separate seniority policies. But, as the courts have noted with some frequency, the policies often operate to perpetuate the effects of hiring discrimination. The overall result is a situation where in many areas of the country blacks and Mexican-Americans serve as city drivers, while road-driver fleets in private trucking firms, at least until very recently, have been virtually all-white/Anglo.

Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 53. See also Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687. Leone, The Negro in the Trucking Industry, U.Pa. (Wharton School Industrial Research Unit), Rep. 15-1970; Nelson, Equal Opportunity in Trucking: An Industry at the Crossroads, E.E.O.C. No. EEO 72001 (1971).

5 Cir. 1974, 505 F.2d 40; Herrera v. Yellow Freight System, Inc., 5 Cir. 1974, 505 F.2d 66; Resendis v. Lee Way Motor Freight, Inc., 5 Cir. 1974, 505 F.2d 69.

Sabala also contends that the Company has discouraged transfers, and thus prejudiced the plaintiff class, by overt acts of discrimination. Sabala alleges that he applied for a road job with Western Gillette in 1967 and was denied such employment because of his race. He was then offered the position of city driver, which he accepted. He has since made numerous unsuccessful attempts to transfer to the road. His complaint alleges that the Company's operations manager told him that he could not "hire your people for the road." Other class members testified that they had not been permitted to apply for road jobs.

The district judge, the Honorable John V. Singleton, Jr., found that the employment practices at the heart of this litigation were discriminatory and perpetuate the effects of past discrimination in violation of Title VII and Section 1981. He enjoined the defendants from continuing discriminatory practices, ordered changes in the seniority system, and awarded back pay and rightful place seniority relief to the individual discriminatees. The court also ordered that the defendants pay the plaintiffs' costs and attorney's fees. The defendants and the class plaintiffs appeal.

The judgment of the district court is affirmed in part, reversed in part, and remanded.

I

Sabala's suit against Western Gillette rests on Title VII and Section 1981; his suit against the three union

defendants rests on Section 1981 exclusively.[4] He contends that the collective bargaining agreements creating separate systems for road and city drivers together with the conditions imposed on transfer are so onerous as to make transfer virtually impossible. Although facially neutral, these practices discriminate in their purpose and effect.

Title VII requires that charging parties exhaust their administrative remedies before they sue in federal court. Although their right to sue is not conditioned on the EEOC's finding of reasonable cause to believe that discrimination has occurred, they may not circumvent the agency's processes. "[I]f charges of employment discrimination have not been filed against the unions, the appellants' right to file suit has not ripened." Miller v. International Paper Company, 5 Cir. 1969, 408 F.2d 283, 291. See also McDonnell Douglas Corp. v. Green, 1973, 411 U.S. 792, 798-99, 93 S.Ct. 1817, 36 L.Ed.2d 668. In their EEOC charges, the plaintiffs alleged only that Western Gillette was guilty of employment discrimination; they made no allegation of discrimination by the union. Following *Miller,* the district court found that it had jurisdiction over the Company, under 42 U.S.C. § 2000e, but that it did not have

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[4]Sabala's complaint states two separate theories of recovery. First, Sabala alleges that the defendants, International Brotherhood of Teamsters, Southern Conference Teamsters, and Local 988, violated their duties of fair representation under 29 U.S.C. § 151 because they knowingly acquiesced, joined, or conspired with the company, in the alleged discriminatory practices. The complaint also alleges that they have neglected to take any affirmative steps toward protecting Mexican American and black employees from those practices. The district court found that none of the union defendants breached its statutory duty of fair representation. Sabala v. Western Gillette, S.D.Tex. 1973, 362 F.Supp. 1142, 1156. The plaintiffs do not appeal from that finding and we need not consider that issue here.

jurisdiction over the union defendants under that section.

[1] The claim under Section 1981, on the other hand, is an independent cause of action. The Supreme Court has noted that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Alexander v. Gardner-Denver Company, 1974, 415 U.S. 36, 48-49, 94 S.Ct. 1011, 1020, 39 L.Ed.2d 147. The filing of EEOC charges is not a condition precedent to suit under Section 1981. See Alpha Portland Cement Company v. Reese, 5 Cir. 1975, 507 F.2d 607, 610. "Section 1981 and Title VII . . . provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch to the breaking point courts' customary duty to accommodate allegedly conflicting legislation." Macklin v. Spector Freight Systems, Inc., 1973, 156 U.S.App.D.C. 69, 478 F.2d 979, 996. The district court properly found that it had jurisdiction over the employer and the union defendants under Section 1981.

The trial of this cause was conducted in a bifurcated proceeding. The first part of the trial, which considered the issues of jurisdiction and liability, took place in October and November of 1972. Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142. After the court found jurisdiction and liability, the trial court conducted a second hearing in November, 1973 on issues pertinent to fashioning a remedy. Sabala v. Western Gillette, Inc., S.D.Tex. 1974, 371 F.Supp. 385. The bifurcation of the cause anticipated the procedure recently suggested by this Court in Baxter v. Savannah

Sugar Refining Corporation, 5 Cir. 1974, 495 F.2d 437.[5]

On the basis of testimonial and statistical evidence, the trial court concluded that the employer had discriminated in the past against the plaintiff class and that the present dual seniority system, as applied, perpetuates past discrimination by deterring minority employees from transferring to the road because of the necessary loss of their job seniority. The district court then considered whether the Company's present dual seniority system is justified by any business necessity. "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose." Local 189, United Papermakers and Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 989. See also Carey v. Greyhound Bus Co., 5 Cir. 1974, 500 F.2d 1372, 1376. The district court found no evidence in the record to suggest any legitimate nonracial business purpose that would justify

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[5]In Baxter, Judge Gewin wrote:

> "A Title VII class action suit presents a bifurcated burden of proof problem. Initially, it is incumbent on the *class* to establish that an employer's employment practices have resulted in cognizable deprivations to it as a class. At that juncture of the litigation, it is unnecessarily complicating and cumbersome to compel any particular discriminatee to prove class coverage by showing personal monetary loss. What is necessary to establish liability is evidence that the *class* of black employees has suffered from the policies and practices of the particular employer. Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus entitled to back pay or other appropriate relief."

495 F.2d 437, 443-44.

the continued maintenance of dual seniority systems for road and city drivers at the Houston Terminal.[6] Moreover, it found that both Western Gillette and the defendant unions were responsible for this discrimination.

In fashioning a remedy the district court declined to require a complete merger of the two seniority systems on the ground that the relief would inequitably affect the seniority of various groups of Western Gillette employees. "There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority rights of those city drivers who remain in their positions." Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 61. The trial judge noted that such a complete merger of the seniority lines would have various shortcomings. "It would prejudice recently hired or transferred road drivers including minority drivers because they could be bumped off their job by city drivers with lower seniority on the city roster. Further, city employees who during the early years of their employment have enjoyed a weekly guarantee and consequent higher pay as compared to similarly situated road drivers would be permitted to move to the road with a resulting freeze of lower seniority men in the least attractive low-paying road jobs." Sabala v. Western Gillette, Inc., S.D.Tex. 1974, 371 F.Supp. 385, 388. The trial judge ordered that all class members be afforded an opportunity to transfer to the road positions that had been denied to them, either by outright discrimination or by virtue of having been locked into their city jobs because of the collective bargaining

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[6]See Rodriguez v. East Texas Motor Freight, 5 Cir. 1975, 505 F.2d 40, 56-59.

agreement. The court determined that relief should be sufficiently broad to insure that a transferring discriminatee would be able to keep his road job once he obtains it. The trial court ordered, therefore, that transferring discriminatees be given their "rightful place" seniority dates to facilitate the maintenance of their new positions. "A complete decree must give enough relief to insure that the transferred discriminatees are able to *maintain* their rightful place. Thus the rightful place theory dictates that we give the transferring discriminatee sufficient seniority carry-over to permit the advancement he would have enjoyed, and to give him the protection against layoffs he would have had, in the absence of discrimination." *Bing v. Roadway Express, Inc.*, 5 Cir. 1973, 485 F.2d 411, 450.

The trial court also provided for the award of back pay to city drivers who had been able and willing to transfer to the road, but were denied the opportunity to do so because of racial discrimination. The court did not require that the discriminatees offer proof that they had individually applied for road jobs that were in fact open.[7] Although an application requirement

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[7]In Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364, we said:

> "[T]he initial burden is now placed on the individual labor department employee to show that he is a member of the recognized class subject to employment discrimination, . . . Unquestionably, it is now impossible for an individual discriminatee to recreate the past with exactitude . . . If an [individual] employee can show that he was hired into the labor department . . . and was subsequently frozen into that department because of the discriminatory employment practices established here, thus we think the individual discriminatee has met his initial burden of proof . . . It will be incumbent upon Goodyear to show by convincing evidence that other factors would have prevented his transfer regardless of the discriminatory employment

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would be an easy device for establishing the identity of class members who should recover damages and for establishing an appropriate date for application of the rightful place doctrine, the equities of such a requirement are almost certainly illusory. It makes little sense to require of minority employees, retrospectively, formal application for transfer to positions that they reasonably knew to have been closed to their class.[8] Although a few city drivers may have had the courage, intransigence, or naivete to apply for road jobs that were categorically and impermissibly beyond their reach, most would certainly not have bothered to make application in such circumstances. "If an employee realize full well that blacks are simply not hired as road drivers, why should he bother to apply?" Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 451.

Judge Singleton held that no back pay should be computed for time after July 17, 1973, the date he had ordered that the discriminatory practices be terminated. He found that a road driver for Western Gillette expends 10 per cent of his gross annual pay on employment-related expenses and that such an amount should be deducted from back pay awards

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practices . . . Any doubts in proof should be resolved in favor of the discriminatee giving full and adequate consideration to applicable equitable principles."

491 F.2d 1364, 1379-80. See also Pettway v. American Cast Iron Pipe Company, 5 Cir. 1974, 494 F.2d 211, 259.

[8]In the present case, the company has steadfastly maintained that road jobs do not exist while, at the same time, it has allowed white "casuals" to gain road employment by forcing on into those jobs. This fact, in concert with the impediments to transfer found in the overt discrimination and loss of seniority penalty established in the district court, would make formal application appear to be a futile act.

to discriminatees. With regard to deductions for "moonlight" earnings actually earned by the discriminatees (which they would not have been able to earn as road drivers), the court found the evidence inconclusive, retained jurisdiction to consider further evidence, and conditioned award of back pay to any discriminatee on his providing the court with sufficient information to make such a determination. Finally, the court provided that no discriminatee should receive back pay until Western Gillette had offered him a road job, which he had accepted, and which he had held beyond the 180-day retreat period. If the discriminatee were willing to waive the 180-day retreat period, then he would be able to receive his back pay award at the time of waiver.

The parties make numerous assignments of errors on appeal. Western Gillette contends that the trial court erred in finding that the Company discriminated against the plaintiffs. The Company also argues that the court erred in assigning "rightful place" seniority dates for the purpose of fashioning affirmative relief. Western Gillette contends, too, that the trial court erred in not restricting the award of back pay to those members of the plaintiff class who in fact sought transfers to the road and were denied such transfers for discriminatory reasons. Next, the Company insists that the trial court erred in its method of calculation of back pay. Finally, Western Gillette contends that the trial court should have provided that the defendant unions in this action share in the burden of satisfying the back pay award to the plaintiffs.

The International Brotherhood of Teamsters and the Southern Conference contend that the trial court erred in assessing attorney's fees and costs against the de-

fendant unions under Section 1981. They also contend that the trial court erred in basing the seniority relief accorded the plaintiff class on the Company's modified seniority system and Committee-ordered changes of operation.

Local 988 contends that the district court erred in finding that the local violated Section 1981 by delegating its bargaining authority to the National Committee and by signing the separate Road and City contracts negotiated by the National Committee and ratified by the national membership. The local suggests that it should not be liable under Section 1981 because it had no discriminatory intent. As proof of this fact, the local points to its 1970 recommendation to the National Committee that the separate seniority lines of road and city drivers should be merged.

Finally, Sabala contends that the trial court erred in its back pay calculation in that the court should have extended the defendants' liability for back pay until the date the discriminatees in fact achieved road driver status. Sabala also contends that the trial judge erred in limiting the award of attorney's fees to $35,000.

II

[2] We must first determine whether the trial court erred in finding that Western Gillette discriminated against members of the plaintiff class by denying them the opportunity to transfer from city to road jobs. Western Gillette challenges the trial judge's findings on three grounds. First, the Company contends that no discrimination is shown in the records because there is no showing that jobs were available at the Houston Terminal during the period in question. Second, Western Gillette argues that the testimonial evidence does not

establish overt discrimination. Finally, the Company contends that the statistical proof of discrimination adduced at trial is insufficient to support a finding of discrimination.

A. *JOB AVAILABILITY*

[3] The existence of a job vacancy, as Western Gillette correctly asserts, is logically necessary to a finding that a member of a disfavored class was denied employment because of impermissible discrimination. The Company contends that the business of its Houston Terminal has declined steadily and that no new road positions have become available during the period in question. The general decline of a business, with its concomitant effects on employment, of course, magnifies rather than lessens the need for strict compliance with the requirements of the federal civil rights acts. We have considered this problem previously in United States v. Jacksonville Terminal Company, 5 Cir. 1971, 451 F.2d 418. In *Jacksonville Terminal,* we held that the continued use of craft and class seniority systems to restrict the transfer and promotion of incumbent black employees at the declining Jacksonville railway terminal was neither *bona fide* nor a business necessity, and was in violation of Title VII requirements. "In any industry loss of seniority is a critical inhibition to transfer . . . At the Terminal where total employment has decreased in recent years and preservation of seniority has become essential to economic survival, this transfer impediment is indeed monumental. It cannot survive Title VII's remedial impact." 451 F.2d 418, 452. In *Jacksonville Terminal,* we said that the government, or the discriminatees, must prove that whites received job assignments that were denied blacks, that

the jobs were available when the blacks applied, and that blacks' qualifications were at least equal to those of the hired whites. 451 F.2d 418, 446.

Although Western Gillette contends that no jobs became available at Houston during the period in question, the trial judge found that a number of white "casuals"[9] had been able to "force-on" into regular road jobs and become new road drivers at the Houston Terminal. The trial court concluded that the ability of casuals to force-on into regular roads jobs demonstrates that jobs were in fact available. The Company characterizes the Court's conclusion as seeking "to avoid the problem of the absence of job availability". We find no substance to that characterization.

A casual employee is one who is hired to work temporarily during the Company's periods of heavy volume traffic. Billy Lacy, a Western Gillette official, testified at trial:

> "Well, we have several interline carriers that we do business with who bring us freight from over in the southeast—Alabama, Georgia, Florida—and they bring freight in and give it to us in Houston, which we take on west.
>
> Sometimes we get a lot of freight from them when we weren't expecting very many loads. Sometimes we have—we haul a lot of government ammunition or government commodities, whatever. Maybe some big shipper that we haven't done business with very often in the past will come up and say, 'Hey, I've got fifteen loads of freight that I'm going to have to move from here to

[9]Casual drivers have no seniority. They are not required to work for only one company, but may take jobs with a number of companies located in their areas.

Los Angeles in the next two weeks. Can you handle it?'

We say, 'Yes. We'll take it.'

Things of this nature cause us to use casuals."

Under the terms of the collective bargaining agreement, a driver who works as a casual driver is able to force himself into regular employment if, working as a casual, he is able to earn an average of $150 per week for four consecutive weeks. Whether a particular casual employee is able to earn an average of $150 per week for four consecutive weeks depends, of course, on whether the Company is willing to give an individual driver a sufficient number of trips to meet that figure. Instead of giving a large number of trips to one casual driver, the Company may give a smaller number of trips each to several drivers. In this way, the Company would prevent any individual driver from accumulating a sufficient number of trips to force on as a regular driver. Assuming good management, the Company need never hire a casual who will have forced on; it is entirely within the Company's power to prevent casuals from satisfying the necessary requirements for forcing on. This fact was brought out at trial when the trial judge asked Lacy: "if the terminal operator were on his toes and he had a casual working for him that he didn't like or didn't think was going a good job, wasn't qualified, he would never let him get to the point where he forced himself on you, would he?" Lacy replied, "That's what I tell some of our terminal managers sometimes. That's true."

The evidence adduced at trial demonstrates that the power to exclude force-ons from permanent employment rests entirely with the Company. Western Gillette now

contends that the successful forcing on of casual drivers at Houston demonstrates only that the terminal manager was inept in allocating work assignments to casual employees, and not that there were jobs available. The evidence, the Company suggests, establishes that no jobs were available as a matter of company judgment; all force-ons were simply the result of lax management by the Company's Houston administrative personnel. We find this argument unconvincing. Here, as elsewhere, contemporaneous company practice speaks more truly than retrospective statements of company judgment. The Company had both the power and the business motivation to exclude force-ons from permanent employment if jobs did not exist. It did not choose to do so. We think, therefore, that the trial court's finding that jobs existed is reasonable.

[4] As a final line of defense, Western Gillette contends that the presence of lax management and business conditions that resulted in the use of casuals do not establish any discriminatory intent on the part of Western Gillette. Discriminatory intent is not, of course, an essential element of an employment discrimination action. "Whether an employer is beneficent or malevolent in implementing its employment practices, the same prohibited result adheres if they are discriminatory, economic loss for the class of discriminatees." Baxter v. Savannah Sugar Refining Corporation, 5 Cir. 1974, 495 F.2d 437, 443. See also Johnson v. Goodyear Tire & Rubber Company, 5 Cir. 1974, 491 F.2d 1364. Moreover, we think that any inquiry into the possible existence of discriminatory intent is particularly irrelevant at this stage of analysis. The issue at hand concerns only the factual question whether employment opportunities existed at Western Gillette's Houston

Terminal. The trial court found that the Company allowed casuals to force on as regular line drivers and that this company practice demonstrates the existence of jobs. These findings cannot be set aside as clearly erroneous. See Baxter v. Savannah Sugar Refining Corporation, 5 Cir. 1974, 495 F.2d 437, 445; Smith v. Delta Airlines, Inc., 5 Cir. 1973, 486 F.2d 512, 514.

B. *OVERT DISCRIMINATION*

The plaintiffs do not allege that Western Gillette formally and categorically prevents transfers of its employees from city to road jobs.[10] Instead, they allege

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[10]An absolute bar to transfer is not, of course, required to demonstrate that members of the plaintiff class have been locked in positions that they hold because of past discrimination. We considered similar circumstances in *Rodriguez:*

> The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters . . . have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed *all realistic opportunity for transfer*. Under the no transfer policy a city driver wishing to transfer to road status must first resign his city driver position, with no assurance that he will be hired as a line driver, and no assurance that if he fails to be hired he will be rehired as a city driver. Even if the city driver were to become a road driver, because of the separate seniority rosters he would lose his accumulated competitive-status seniority. He would have the last choice of routes and would be the first laid off. And if laid off he would have no "bumping" rights to recover his city driver job . . . It is no surprise, then, that when the company temporarily relaxed in 1972 its no-transfer policy and its requirement that road drivers have three years line haul experience only five ETMF city drivers in the entire Southern Conference area took, qualified for, and held the road driver job. For a city driver with a significant amount of seniority the choice must have been a difficult one indeed. The named plaintiffs testified that they were unwilling to give up their city driving seniority to transfer to road driving jobs they otherwise

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that Western Gillette discourages its city drivers, most of whom are black or Mexican American, from transferring to road jobs, both by acts of overt discrimination such as ignoring inquiries about possible transfer opportunities and by requiring transferees to divest themselves of their job seniority. See Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 48. The plaintiffs presented testimonial evidence to establish that the company overtly discriminated against individual members of the plaintiff class. The trial court found that testimony convincing and concluded that Western Gillette had discriminated against class members who wished to transfer. The Company now argues that the court's conclusion does not "square" with the testimony presented at trial.

We conclude that sufficient evidence of overt acts of discrimination was adduced at trial to allow the district court to find that the Company discriminated against members of the plaintiff class. Oliver Sabala, for instance, testified that he was working in 1967 for another trucking company, Big 3, when Western Gillette drivers told him that the latter company was in the process of hiring road drivers. Harper, Western Gillette's manager, told Sabala, whom he had known previously, that he was unable to offer Sabala a road job. Harper also told Sabala that he had plenty of work in the city and would be willing to hire him

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> desired. In the strictest sense, city drivers were "locked" into city driving jobs. The discrimination that removed the possibility that a Mexican-American or Negro could obtain a line driver job when first applying to the Company was thus continued and perpetuated by the no-transfer and seniority policies which prevented the city drivers from later transferring to road driver jobs.

Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 56 (emphasis added).

there. Sabala testified that Harper said, "If I do anything else, you'd get us both run off." According to Sabala, Harper also said, "[W]e don't hire your people on the road, and if I wanted to hire you, I couldn't."

Western Gillette now contends that Harper's alleged statements are ambiguous and probably mean only that Harper was unable to offer Sabala a road job because the Company did not have any road jobs available. When extracted from its natural context, Harper's language may indeed appear ambiguous. When set within the framework of the evidence as a whole, however, its meaning is clear. These staements are not the only evidence of overt discrimination.

Sabala testified that he accepted Harper's offer of employment with Western Gillette as a city driver, with the hope that he would be able to move to the more lucrative road job at some time in the future. After he accepted the city job, Sabala allegedly made numerous attempts to transfer to the road but Western Gillette rebuffed those efforts.

Other members of the class also testified that their efforts to move from city to road jobs had failed. Alphonso Adams testified that he asked Western Gillette's Houston operations manager if he could move to the road and that he was told, in response, that he would have to quit his city job, lose his seniority, and start all over, as if he were a new employee. Frank Fountain testified that he asked the operations manager for an application to transfer to the road and was told that he would have to resign from the city to go on the road. The manager then told Fountain that he should not think about going out on the road because he would be laid off shortly after he had

resigned his city job to go to the road. Although Western Gillette's counsel suggested to Fountain that the manager may have been trying to inform him of the dangers implicit in transfer, Fountain stated unequivocally that he understood that the manager was attempting to dissuade him because he did not want him to have the job. The manager's refusal to give Fountain an application, after Fountain said that he understood the implications of transfer, substantiates that interpretation.

Taking the evidence as a whole, we conclude that the trial court's finding of overt acts of discrimination is not clearly erroneous.

C. *STATISTICAL EVIDENCE*

The trial court found that Western Gillette's employment statistics prove the existence of discrimination. The statistics show that no black or Mexican American has been hired by Western Gillette as a new road driver in the Southern Conference. Two blacks and a Mexican American currently work on the road for Western Gillette in the Southern Conference, but these three men all transferred to the Conference from road positions with the Company in other sections of the country.

At Houston, Western Gillette has 29 road drivers. One of these drivers is a Mexican American; none is a black. The racial composition of the city drivers at Houston is radically different. The eleven drivers who were hired in 1956 or before are all blacks. Fifty-four drivers have been hired since 1956. Twenty-three are white, twenty-five are black, and six are Mexican American. From these statistics, the trial court found that a pattern of discrimination against minority

group road drivers exists at Western Gillette's Houston terminal.

[5] A pattern of past discriminatory hiring is essential to the plaintiff's case. That pattern may be established by statistical evidence in conjunction with other evidence or by statistical evidence alone. Rodriguez v. East Texas Motor Freight, 5 Cir. 1974, 505 F.2d 40, 53. "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference." United States v. Hayes International Corp., 5 Cir. 1972, 456 F.2d 112, 120.

Of the twenty-nine road drivers at Houston, only one belongs to a minority group. Of the sixty-five city drivers at Houston, forty-two are either blacks or Mexican Americans. The defendants argued in the trial court that these statistics do not show racial discrimination because the exclusion of minorities from road jobs was not total. The trial court properly rejected that line of reasoning.

The defendants now contend that the hiring statistics are irrelevant and that the transfer statistics, which show that some minority group members did transfer in the Southern Conference, are more relevant to the issues here. We must emphasize the specific focus of our inquiry here: whether the Company has had a policy of racial discrimination. Obviously, both sets of statistics are relevant to that inquiry. We think, nonetheless, that the hiring statistics may be better evidence of discrimination than are the transfer statistics.[11]

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[11]The defendant's argument is that the transfer statistics demonstrate that some minority employees, despite overt discrimi-

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If the plaintiff's theory is correct, the Company has used the loss of seniority transfer penalty to inhibit the movement of minority employees from city to road jobs. As more white city drivers have appeared on the scene, this penalty has obviously affected their transfer plans as well. The penalty, therefore, has become a blunt instrument of discrimination and has inhibited both white and minority city drivers in transferring from their city jobs. The result is that few city drivers of either race transfer to the road. From a purely statistical viewpoint, comparison of white and minority transfer is of limited utility because of the small size of the sample. If the design of the loss of seniority penalty is to prevent the transfer of city drivers to the road, it makes little sense to compare the numbers of white and minority city drivers who have transferred despite the loss of their seniority. The seniority loss penalty throws up a road-block to all city drivers in pursuit of road jobs and screens out some whites as well as minority personnel although, historically, most city drivers were black. The material distinction is, of course, that the white drivers could have applied for road jobs initially. We have noted this fact elsewhere:

> Those white drivers who were employed as city drivers presumably had the opportunity to apply

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nation and the loss of their seniority, have been willing to transfer. Since these artificial barriers to transfer are themselves discriminatory, the fact that some class members have been willing to take their chances and transfer despite the overt hostility of company officials and the loss of job seniority is insignificant. No allegation has been made that the company has absolutely and categorically barred transfer. The discrimination it has practiced is more subtle than that. Consequently, the company's reasoning is circular and the point it makes is trivial.

> as road drivers but either were not qualified or preferred city work. Unlike . . .
>
> [the plaintiffs], the white drivers were not barred from the position of road driver by virtue of their race. Consequently, though the no-transfer policy may serve to keep all drivers in their present positions, the discriminatory hiring practices . . . colors the policy . . . with a distinctively discriminatory tint.

Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 690.

The number of transfers was insignificant; most of the new road drivers are not transfers, but casuals who have been able to force on. They are all white. The statistical evidence is impressive.

III

Western Gillette next contends that the trial court erred in determining that the dual seniority system perpetuates past discrimination.

We think that the statistical evidence of discrimination and the testimonial evidence relating to Western Gillette's overt acts of discrimination, noted above and in the trial court's order, demonstrate the existence of past discrimination. Moreover, the evidence shows that the dual seniority system perpetuates past discrimination. Consequently, we find no merit to this contention.

IV

[6] A modified seniority system is in effect at all Western Gillette's terminals in the Southern Conference. Under this modified seniority system, a road driver who is on layoff due to a reduction in force at his

home terminal may "bump in" at another Western Gillette terminal in the Southern Conference and take job assignments there on the basis of his home terminal seniority. He will then displace any road driver with less seniority at the host terminal. The purpose and effect of this modified seniority system is to permit senior men to maintain the most lucrative jobs by giving them the mobility to reach those jobs when conditions are not favorable at their home terminals.

The trial court utilized the modified seniority system in its determination of rightful place seniority dates for the discriminatees at the Houston terminal.[12] The modified seniority system effectively extends the road driver's universe of job opportunities to the whole Southern Conference. As a result, the trial court believed it proper to make the available universe of relief coterminous with the universe of job opportunities from which the discriminatees were excluded because of discrimination.

Under Title VII, Congress has granted the courts plenary equitable power to fashion an appropriate remedy for employment discrimination. Pettway v. American Cast Iron Pipe Company, 5 Cir. 1974, 494 F.2d 211, 243. "Most courts, in molding appropriate remedies, have adhered to the 'rightful place' theory, according to which blacks are assured the first opportunity to move into the next vacancies in positions which they would have occupied but for wrongful discrimination and which they are qualified to fill." United States v. Georgia Power Company, 5 Cir. 1973, 474 F.2d 906, 927.

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[12]See Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 988.

The trial court found that ten of the qualified class members would have accepted employment at any Western Gillette terminal in the Southern Conference. Thirteen class members would not have accepted employment anywhere but at the "declining" Houston facility. The trial court also found that road jobs were available both in Houston and elsewhere in the Southern Conference and that the discriminatees would have taken those jobs but for discrimination. Those discriminatees who wished to transfer out of Houston to more lucrative positions elsewhere in the Conference would have been able to do so, absent discrimination, because of the modified seniority system in effect.

The trial court assigned rightful place seniority dates by distinguishing between those discriminatees who would have accepted employment anywhere in the Conference and those who would have accepted employment only at Houston. Those class members who would have accepted employment anywhere in the Southern Conference were assigned rightful place seniority dates based on the job next available anywhere in the Conference after the date on which a discriminatee was qualified to drive on the road. Those discriminatees who limited themselves to Houston employment were assigned seniority dates based on the job next available at Houston. See Sabala v. Western Gillette, Inc., S.D. Tex. 1974, 371 F.Supp. 385, 388-89. In light of all the circumstances here, we think that this part of the relief ordered by the trial court was properly within its statutory discretion and conformed to its responsibility to frame an efficacious remedy.

V

[7] The union defendants contend that the district court erred in finding them responsible, in part, for

the discriminatory practices at the heart of this lawsuit. Local 988 is the collective bargaining agent for the discriminatees who bring this action. The membership of Local 988 delegated its bargaining authority to the National Bargaining Committee and ratified the contract that the National Bargaining Committee negotiated. The stimulus for the local's actions was the recognition that the National Bargaining Committee could negotiate a better contract with Western Gillette than could the local by itself. The result of these negotiations was a collective bargaining agreement that the district court found discriminatory in its effects.

Local 988 contends that the fact of its minority control, together with the fact that the local did not initiate or negotiate the contracts, remove this case from application of the "landmark decisions" of this Court. See Local 53, Insulators v. Vogler, 5 Cir. 1969, 407 F.2d 1047; Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980; United States v. Hayes International Corporation, 5 Cir. 1969, 415 F.2d 1038. Local 988 also notes that it actively petitioned the National Bargaining Committee to merge the separate seniority systems. Given the Local's informed decision to participate in the national bargaining negotiations despite discrimination, because of the tangible economic benefits a national contract promised to its members, we find the argument unpersuasive. See Baxter v. Savannah Sugar Refining Corporation, 5 Cir. 1974, 495 F.2d 437, 443.

The other union defendants were parties to the national bargaining negotiations and the architects of the seniority systems. See Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1394.

In light of all the evidence, we hold that the district court's findings of union participation in discrimination were not clearly erroneous.

VI

[8] Western Gillette contends that the district court should not have granted back pay relief to any class member who did not in fact make formal application for a road job and who was not discriminatorily denied such employment. This argument, of course, contains within it the expectation that no one would receive back pay because Western Gillette has created no new jobs at the Houston Terminal since May 1966. Hence, no one could be discriminatorily denied transfer, because the absence of a job is the best reason for denying employment. United States v. Jacksonville Terminal, 5 Cir. 1971, 451 F.2d 418, 446.

As we have noted previously, there are 29 road drivers at Houston. Seven of these drivers are casuals who have been able to force on. The Company contends that the employment of seven casuals who have forced on due to "lax management in peak periods of business stress" does not establish that a job was available or that the Company wished to fill a road position. A necessary element to a finding of job discrimination is that the alleged discriminatee be "qualified for a job for which the employer was seeking applicants". *McDonnell-Douglas Corporation v. Green,* 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed. 668. We think, however, that the Supreme Court did not mean to suggest that a company could discriminate with impunity by filling available positions by other means, such as force-ons, rather than by entertaining applications. Western Gillette, as a business run for

profit, could not rationally permit casuals to force on, and then continue, in non-existent jobs. We must conclude, with the district court, that new jobs did exist during this period.

Western Gillette chose to fill available jobs with casual employees whom the Company allowed to force on. At the same time, it refused to allow city drivers to carry over their job seniority to new positions if they transferred. We have held that this seniority penalty is unacceptable in that it perpetuates past discrimination. In these circumstances, we think that the district court properly awarded back pay without regard to whether an individual plaintiff actually made inquiries about the possibility of transfer to jobs (which the Company contends do not exist) on terms which we think impermissible. See *Bink v. Roadway Express, Inc.*, 5 Cir. 1973, 485 F.2d 441, 451.

The trial court attempted to award back pay in an equitable manner, taking into consideration material differences among the individual discriminatees.[18] Western Gillette contends that the Court erred because one factor it thought immaterial was whether or not

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[18]In making an award of back pay, considerable difficulty stems from the court's unavoidable problem of interpreting the significance of silence on the part of discriminatees. On the one hand, it may indicate disinterest. On the other hand, it may indicate a sense of futility. Moreover, only the most ingenuous would fail to note that the possibility of a large back pay award may stimulate retrospective interest where none initially existed. In these circumstances, the trial judge must be accorded wide discretion in determining criteria for the award of back pay. "The rationale in *Bing* was that silence might be caused by a belief in the futility of a transfer request. That may be true, but also it may be caused by no desire to transfer. The District Judge is in the best position to determine this issue." Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416, 421.

an individual applied for a job which the Company would tell him did not exist. The court acted reasonably. Part of the problem of fashioning back pay relief in this case springs from the Company's tenacity in maintaining that no new jobs existed while, at the same time, it continued to upgrade white casuals to permanent road jobs. If the chancellor's pen is less fine than the Company would choose, it is in part the result of the Company's obfuscatory tactics. In these circumstances, "it suffices for the trial court to determine the amount of back wages 'as a matter of just and reasonable inference'." *Brennan v. City Stores, Inc.*, 5 Cir. 1973, 479 F.2d 235, 242.

VII

[9] This Court has consistently held that back pay awards are not punitive. They are an integral part of the equitable relief to which discriminatees are entitled "to economically elevate [them] to the status which is rightfully theirs". *Johnson v. Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1376. See also *United States v. Georgia Power Co.*, 5 Cir. 1973, 474 F.2d 906, 921; *Carey v. Greyhound Bus Co.*, 5 Cir. 1974, 500 F.2d 1372, 1378. In determining the amount of back pay to which the discriminatee would be entitled, the trial court carefully considered numerous formulae that the parties presented for his consideration. Indeed, the trial court noted that the "variety of formulae by which individual back pay due this class of discriminatees can be computed is bewildering". *Sabala v. Western Gillette*, S.D.Tex. 1974, 371 F.Supp. 385, 392.

The trial judge computed back pay awards in the following manner. First, he selected a reasonably pru-

dent (i. e. representative) road driver and a reasonably prudent city driver, each having characteristics representative of their peers with respect to seniority, earnings and work habits. Next, he compared the average monthly earnings of these representative drivers for the period June 3, 1968 to July 17, 1973. The trial court there found that an average road driver, on a monthly basis, earns 1.56 times the amount earned by an average city driver. The trial judge acknowledged that this method of damage calculation contains a statistical disparity and does not measure what the plaintiffs would have earned if they had been given the first available opportunity to transfer. The trial court, nonetheless, thought this formula was the best available method of estimating the back pay to be awarded.

The court then computed the discriminatee's earnings for the period from June 3, 1968 to July 17, 1973, or from his "rightful place" seniority date to July 17, 1973, whichever period was the lesser. That figure was then multiplied by a factor of 1.56, reduced by 10 percent to account for employment-related expenses, and further reduced by the amount of any "interim earnings" that the discriminatee had been able to earn while working as a city driver, which he would not have been able to earn if he had been on the road.

The inherent difficulties in computing back pay require that the district courts be allowed broad discretion:

> The method of calculating a class-wide back pay award must not be rigid. This results from the *impossibility of calculating the precise amount of back pay*. There is no way of determining which

> jobs the class members would have bid on and have obtained if discriminatory testing, seniority, posting and bidding system, and apprentice and on-the-job training programs had not been in existence. Class members outnumber promotion vacancies; jobs have become available only over a period of time; the vacancies enjoy different pay rates; and a determination of who was entitled to the vacancy would have to be determined on a judgment of seniority and ability at that time. The process creates a quagmire of hypothetical judgments.

Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 260 (emphasis added).

In *Pettway*, Judge Tuttle recognized that there were several possible methods for computing back pay, and that the choice of method was essentially a question for the trial court, subject to our correction if the trial court's method was so unreasonable as to amount to an abuse of discretion. As Judge Tuttle suggested, the proper method of computation of back pay depends on the complexity of the case. "It should be emphasized that this is not a choice between one approach more precise than another. Any method is simply a process of conjectures . . . [E]xact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical." 494 F.2d 211, 261-62.

In the circumstances of this case, we think that the method chosen by the district court to determine back pay was not unreasonable. We find no abuse of discretion by the trial court.

VIII

[10] The plaintiffs also contend that the district court erred in framing back pay relief. The discriminatees argue that the court should have extended back pay relief to the date that each individual discriminatee achieved road driver status. Instead, the court allowed back pay relief only until July 17, 1973, the date of its first order. At the same time, the trial court conditioned payment of the back pay awards on the offer and acceptance of road jobs in individual cases. Although logic may suggest that these two dates should coincide, we do not think that that result is required as a matter of law. We think that a court of equity, in framing its relief, is at liberty to do what the district court has ordered here.

Judge Tuttle has stated the relevant standard of review in back pay award cases: "Because of the compensatory nature of a back pay award and because of the 'rightful place' theory, adopted by the courts, and of the strong congressional policy, embodied in Title VII, for remedying employment discrimination, the scope of a court's *discretion to deny* back pay is narrow." Pettway v. American Cast Iron Pipe Company, 5 Cir. 1974, 494 F.2d 211, 252 (emphasis added). In *Pettway,* the court ordered injunctive relief to aid the discriminatees in gaining and maintaining their rightful place. 494 F.2d 211, 248. Although we ordered the district court to require the company to take affirmative steps to insure that the discriminatees be given their rightful place, we did not require the district court to award back pay to the date they would actually take their rightful place. "The termination date of the back pay period for most claimants will be the date of the *district court's decree implement-*

ing our decision, but may, depending on the employees' situation, be March 31, 1971, the date testing was ended." 494 F.2d 211, 258 (emphasis added).

[11] The termination date in the present case was relatively earlier than in *Pettway* in that the district court used the date of its *initial decree* as the termination date. In the context of the particular relief ordered by the district court, the selection of that termination date was not unreasonable. We note that the trial court retained jurisdiction, although only for a period of one year, to evaluate the company's efforts in remedying the discrimination and to order further relief, if necessary. That year is now over. We are of the view, therefore, that the district court should retain jurisdiction for such further time as may be necessary to carry out that relief.

Several problems face the trial court. As the date of its original order recedes further into the past, injury to those plaintiffs who have not yet been offered road jobs will, of course, increase and be compounded. At the same time, the *possibility* exists that proper regard for the Company's business efficiency will not permit Western Gillette to offer road jobs to all the discriminatees during that same period. The trial court must be sensitive to the needs of the discriminatees, but it must be equally vigilant in avoiding results that interfere with the company's legitimate business decisions. In these circumstances, it is the task of the trial court to balance relevant considerations and do equity. The relief granted by the trial court, limited as it was, was designed to effect this nice balance of interests.

At the same time, the district court's retention of jurisdiction demonstrates that it recognizes that further

relief may be required if the company does not conform its conduct to the spirit as well as the letter of the district court's decree. On remand, the district court may, if necessary, reconsider the back pay relief granted in light of the company's ability to date to find jobs for the discriminatees. We do not, however, find any abuse of discretion in the court's failure to grant back pay to the date of achieving road driver status on the record facts.

IX

[12] The trial court found that the company and the three union defendants shared responsibility for the discriminatory practices at the heart of this dispute. Consequently, it ordered that attorney's fees should be paid by all the defendants, the company paying one-half the amount and the unions sharing liability for the other half. Without setting forth any reasons, however, it awarded the full amount of back pay liability against the company alone.

On appeal, Western Gillette contends that the trial court failed to make the unions liable for back pay because it erroneously thought that it lacked the power to do so. The trial court did not have the benefit of our decision in Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364. In *Johnson,* we held that the district court properly awarded back pay relief against the defendant union. We said:

> Common sense demands that a union be held to the natural consequences of its labors in negotiating a collective bargaining agreement.
>
> Guided by the facts of this case it would be difficult to fasten liability on one party to the labor contract which was a substantial cause of

> the discriminatory employment practices and grant total immunity from such liability to the other party. The union was more than a passive participant in the contractual arrangements which furnished a substantial contribution to the discriminatory results evident here.

Johnson, 491 F.2d 1364, 1381-82.

For its part, the union points out that the trial court was made aware of the possibility of allocating back pay relief among the defendants at an early stage of the case. During its consideration of the jurisdiction issue, at the beginning of the lawsuit, the court asked counsel several questions concerning the differences between Title VII and Section 1981 cases. The following colloquy took place:

> The Court: Well, there's a Fifth Circuit opinion —I don't know whether I have it out here or not—holding that if no complaint was filed against the union, that they are not amenable to a Title VII case.
>
> Mr. Rosenblum: Well, of course, adequate relief of the nature which we seek can be afforded under 1981.
>
> The Court: We can't grant injunctive relief under 1981, can we? I don't know. I'm asking.
>
> Mr. Rosenblum: I think you can, Your Honor, yes.
>
> The Court: As well as damages?
>
> Mr. Rosenblum: As well as damages and—I don't think that the disparity of relief available under 2000(e) [§ 2000e] and 1918 is that—
>
> The Court: Is that different?
>
> Mr. Rosenblum: —that controlling that it would limit their presence here.

This colloquy is not sufficient to resolve the ambiguity in the district court's order.

On remand, the court should reconsider its award of back pay in light of Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 1974, 491 F.2d 1364. The trial court should also state reasons for its decision.

X

[13] The district court awarded counsel for the plaintiff class $35,000 in attorneys' fees.[14] The court found that Western Gillette was liable for one-half the amount of attorneys' fees while the three union defendants were each liable for one-third of the remaining one-half. The principle applied by the district court is that "[t]he question of attorneys' fees involves an allocation of responsibility for this discrimination among the various defendants". Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142, 1155. Because the cause of action against the union defendants was grounded solely on Section 1981, the district judge's allocation of attorneys' fees among all the defendants may have been improper in light of the Supreme Court's recent decision in Alyeska Pipeline Service Company v. Wilderness Society, 1975, — U.S. —, 95 S.Ct. 1612, 44 L.Ed.2d 141.

The district court may have allocated its award of attorneys' fees among the four defendants because it mistakenly believed that Title VII and Section 1981 equally confer the power to award attorneys' fees. "The 1964 Civil Rights Act provides that the court, in its discretion, may allow the prevailing party reasonable attorneys' fees as part of the costs . . . The

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[14]The trial court also awarded Ramirez's counsel $12,500 in attorneys' fees. That sum is not contested here.

Fifth Circuit has held that in a § 1981 action the court may also award attorneys' fees." Sabala v. Western Gillette, Inc., S.D.Tex. 1973, 362 F.Supp. 1142, 1155. Thus, the district court allocated liability for the attorneys' fees award among the defendants despite its finding that "the primary responsibility for the discrimination against the class is the Company's". *Id.*, 362 F.Supp. 1142, 1155.

In *Alyeska,* the Supreme Court held that attorneys' fees may not be granted against a losing party except by specific congressional authority or under one of the long-standing judicially fashioned exceptions[15] to the general rule, such as where the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons". 95 S.Ct. 1612, 1622. The Supreme Court noted that the Court of Appeals in *Alyeska*

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[15]Justice Marshall, in dissent, noted a logical inconsistency in the court's analysis. If courts have traditionally had the equitable power to carve out exceptions to the general rule, why has that power now expired so that the courts may now utilize the traditional exceptions but may not add new exceptions? Justice Marshall said:

> In my view, these cases simply cannot be squared with the majority's suggestion that the availability of attorneys' fees is entirely a matter of statutory authority. The cases plainly establish an independent basis for equity courts to grant attorneys' fees under several rather generous rubrics. The Court acknowledges as much when it says that we have independent authority to award fees in cases of bad faith or as a means of taxing costs to special beneficiaries. But I am at a loss to understand how it can also say that this independent judicial power succumbs to Procrustean statutory restrictions—indeed, to statutory silence—as soon as the far from bright line between "common benefit" and "public benefit" is crossed. *I can only conclude that the Court is willing to tolerate the "equitable" exceptions to its analysis not because they can be squared with it but because they are by now too well established to be casually dispensed with.*

Alyeska Pipeline Company v. Wilderness Society, 1975, ... U.S. ...., 95 S.Ct. 1631-32, 44 L.Ed.2d 141 (emphasis added).

had expressly disclaimed reliance on any of the traditional exceptions to the general rule. Explaining the relationship between the judicially fashioned exceptions and the primary responsibility of Congress the Court said:

> Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorney fees; but neither has it retracted, repealed or modified the limitations on taxable fees contained in the 1853 statute and its successors. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is itself to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.

95 S.Ct. 1612, 1623.

The Supreme Court suggested that Congress has the power and judgment to pick and choose among its statutes and to allow attorney's fees under some statutes but not others. The courts, presumably, are not able to do so in the absence of legislative guidance. Consequently, the courts may award attorneys' fees only if explicitly authorized by statute or by one of the traditional exceptions to the general rule. Congress has explicitly authorized the award of attorneys' fees in Title VII litigation. See 42 U.S.C. § 2000e-5(k). Congress has not categorically authorized the award of attorneys' fees in Section 1981 cases. Section 1981 plaintiffs must depend on one of the traditional excep-

tions to the general rule if they are to recover attorneys' fees.

The trial judge found authority for awarding attorneys' fees under Section 1981 in Jinks v. Mays, 5 Cir. 1972, 464 F.2d 1223. In *Jinks,* we held that "[f]ederal district courts may, in their discretion, award attorneys' fees in civil rights litigation where the actions of the defendants were 'unreasonable and obdurately obstinate'. Horton v. Lawrence County Board of Education, 449 F.2d 793 (5th Cir. 1971); Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970) and Williams v. Kimbrough, 415 F.2d 874 (5th Cir. 1969)." *Jinks,* 5 Cir. 1972, 464 F.2d 1223, 1228. The Supreme Court explicitly recognized the *Jinks* exception to the general rule against the award of attorneys' fees in *Alyeska:*

> This Court's summary affirmance of the decision in Sims v. Amos, 340 F. Supp. 691 (M.D.Ala.), aff'd. 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972), cannot be taken as an acceptance of a judicially created private attorney general rule. The District Court in *Sims* indicated that there was an alternative ground available—the bad faith of the defendants—upon which to base the award of fees. 340 F.Supp. at 694. See also Edelman v. Jordan, 415 U.S. 651, 670-671, 94 S.Ct. 1347, 1359-1360, 39 L.Ed.2d 662 (1974).

Alyeska Pipeline Co. v. Wilderness Society, 1975, ... U.S. ....., 95 S.Ct. 1612, 1628, n. 46, 44 L.Ed.2d 141.

The language of the district judge's opinion is ambiguous, however, as to whether he construed *Jinks*

to allow an award of attorneys' fees in all Section 1981 cases or only where the defendants acted in bad faith.

On remand, therefore, the district judge should determine whether the union defendants are liable for attorneys' fees under one of the exceptions to the general rule.

XI

[14] The plaintiffs contend that the court's award of $35,000 in attorneys' fees to the attorneys for the class was inadequate in amount. The trial court based its award on a finding "that the amounts . . . are reasonable under the circumstances in light of the time spent in preparation and litigation of the cause, the complexity of such preparation and litigation, and the novelty of the issues." Sabala v. Western Gillette, Inc., S.D.Tex. 1974, 371 F.Supp. 385, 394.

Without expressing any opinion on the ultimate issue of the adequacy of the attorneys' fees awarded, the conclusory language of the trial judge's order effectively prevents any meaningful review of the award made. "The fixing of attorney's fees must be left to the discretion of the trial judge, but the failure below to state the premise for limiting the award gives us no basis to determine whether that discretion was properly exercised." Mims v. Wilson, 5 Cir. 1975, 514 F.2d 106.

On remand, the district court should provide a statement of reasons supporting the amount of this award and, if necessary, take further evidence on the issue.

* * *

The judgment of the district court is affirmed in part, reversed in part, and remanded.

APPENDIX B.

United States Court of Appeals For the Fifth Circuit, October Term, 1974, No. 74-2711.

D. C. Docket No. CA-71-H-961; 71-H-1338.

Oliver I. Sabala, Individually and on behalf of all others similarly situated, Plaintiff-Appellee-Cross-Appellant, v. Western Gillette, Inc., et al., Defendants-Appellants-Cross-Appellees.

Leonard M. Ramirez, Plaintiff-Appellee, v. Western Gillette, Inc., et al., Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas.
Before Wisdom, Simpson and Roney, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that costs be taxed one-half against Western Gillette, Inc., one-fourth against So. Conference of Teamsters and one-fourth against International Brotherhood of Teamsters.

August 4, 1975

Issued as Mandate.

APPENDIX C.

United States Court of Appeals, Fifth Circuit, Office of the Clerk.

November 16, 1976.

TO ALL COUNSEL OF RECORD

NO. 74-2711—Oliver I. Sabala, ET AL v. Western Gillette, Inc., ET AL.—Leonard M. Ramirez v. Western Gillette, Inc. ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
/s/ By Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. G. William Baab
Mr. A. J. Harper, II
Mr. Theodore W. Russell
Mr. James P. Wolf
Mr. Henry M. Rosenblum
Mr. Sidney Ravkind

APPENDIX D.

(362 F.Supp. 1142)

Oliver I. Sabala, Individually and on Behalf of All Others Similarly Situated v. Western Gillette, Inc., et al.

Leonard M. Ramirez, Individually and on Behalf of All Others Similarly Situated v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.

Civ. A. Nos. 71-H-961, 71-H-1338.

United States District Court, S. D. Texas, Houston Division.

July 17, 1973.

Consolidated actions by black and Mexican American who claimed that existence of dual seniority system for "city drivers" and "road drivers" locked in past discriminatory employment practices. The District Court, Singleton, J., held that evidence established that there had been discriminatory employment practices which were locked in by existence of dual system, and court set forth appropriate relief.

Order accordingly.

1. *Federal Civil Procedure Key 184*

Allegations and evidence that employer and international, regional, and local unions acted on grounds generally applicable to class and thereby made appropriate injunctive relief with respect to class as whole demonstrated that suit based on claim that seniority systems resulted in locking in past discriminatory practices in employment could be maintained as class action even though there were only 26 members of class.

Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed. Rules Civ.Proc. rules 23, 23(b)(2), 28 U.S.C.A.

2. *Federal Civil Procedure Key 184*

Suits to enjoin racial discrimination in employment are by their nature appropriate for class action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed.Rules Civ.Proc rules 23, 23(b)(2), 28 U.S.C.A.

3. *Federal Civil Procedure Key 184*

Even though some relief might need to be fashioned individually, common questions of law and fact as to whether existence of racially neutral seniority system locked in past discriminatory practices as to class of Mexican Americans and blacks was enough to satisfy requirements for maintenance of class action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed.Rules Civ.Proc. rules 23, 23(b)(2), 28 U.S.C.A.

4. *Federal Civil Procedure Key 184*

Mexican American who brought action against employer and international, regional, and local unions for alleged discriminatory employment practices based on claim that seniority system locked in past discrimination could adequately represent class of both Mexican Americans and blacks. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981; Fed.Rules Civ.Proc. rules 23, 23(b)(2), 28 U.S.C.A.

5. *Federal Civil Procedure Key* 184

Where class action was brought against trucking company employer and international, regional and local

unions for alleged discriminatory employment practices based on claim that seniority system locked in past discrimination at particular terminal, court would not expand class to include minority employees employed at employer's other terminals. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. §2000e et seq. and § 1981; Fed.Rules Civ.Proc. rules 23, 23(b)(2), 28 U.S.C.A.

6. *Civil Rights Key 38*

Where employees who brought civil right action against employer and international, regional, and local unions based on claim that seniority system locked in past discriminatory practices had not filed charge with Equal Employment Opportunity Commission, action could not be maintained under 1964 Civil Rights Act provisions relating to discriminatory employment practices. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. *Civil Rights Key 44(1)*

Evidence established that Mexican Americans and blacks had been discriminated against by trucking company which had only one of 29 road drivers who was member of minority group while 42 out of 65 city drivers were members of minority groups. 42 U.S.C.A. § 1981.

8. *Civil Rights Key 44(4)*

Evidence established that dual seniority system which restricted transfers between jobs of "city driver" and "road driver" locked in past discrimination. National Labor Relations Act § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; 42 U.S.C.A. § 1981.

9. *Civil Rights Key 9.12*

Neither company nor unions can have dual seniority system that locks in past discriminations even if there happens to be no positions available at the time. National Labor Relations Act § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; 42 U.S.C.A. § 1981.

10. *Civil Rights Key 9.12*

Present good faith on part of employer and unions has little relevance to difficult question of facially neutral but in fact discriminating seniority systems. National Labor Relations Act § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; 42 U.S.C.A. § 1981.

11. *Civil Rights Key 39*

Overriding legitimate nonracial business purpose is defense to suit under Civil Rights Act of 1964 provisions relating to discriminatory employment practices. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. *Civil Rights Key 44(1, 4)*

Evidence failed to establish any legitimate nonracial business purpose justifying racial discrimination in hiring and transfer practices of trucking company employer which had members of minorities as "city drivers" but limited number of "road drivers" who were members of minority groups. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. and § 1981.

13. *Labor Relation Key 219*

Local union which signed agreements providing for separate seniority rosters and which was agent of its members had duty to protect its members against discrimination. National Labor Relations Act, § 1 et

seq. as amended 29 U.S.C.A. § 151 et seq.; 42 U.S.C.A. § 1981.

14. *Civil Rights Key 13.7*

International and regional union which were parties to contract containing provision leading to discriminatory employment practices violated Civil Rights Act of 1866. 42 U.S.C.A. § 1981.

15. *Civil Rights Key 9.11*

Union organizations have duty to inquire into effect of contract provisions when it is reasonable to assume that they might lead to discrimination. 42 U.S.C.A. § 1981.

16. *Civil Rights Key 9.11*

Unions have affirmative obligation to protect members from illegal discrimination and such duty includes responsibility to determine if agreements they have negotiated lock in any past discrimination. 42 U.S.C.A. § 1981.

17. *Civil Rights Key 46*

Even though existence of dual seniority system for "city drivers" and "road drivers" locked in past discriminatory employment practices, court would not order unified seniority roster. Civil Rights Act of 1964, §§ 701, 703(a)(1) 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1, et seq. as amended 29 U.S.C.A. § 151 et seq.

18. *Civil Rights Key 46*

Remedy for eliminating discriminatory practices which existed by virtue of existence of dual seniority system which locked in past discriminatory practices set forth. Civil Rights Act of 1964, §§ 701, 703(a)(1),

42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

19. *Civil Rights Key 46*

In class action based on discriminatory employment practices, back pay may be awarded as part of injunctive relief needed to obviate past discrimination. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq,; Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

20. *Civil Rights Key 46*

Where there existed past discriminatory employment practices and such practices were continued as result of maintenance of dual seniority system for "city drivers" and "road drivers" city drivers who would have transferred to road positions or who would have hired on at road positions absent discrimination were entitled to recover from the company back pay equalling difference between salary they did receive and salary they would have received absent discrimination. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.

21. *Civil Rights Key 46*

Employer may not evade its burden of having to pay to rectify discriminatory practices by saying that seniority system which locked in discriminatory practices was unions' responsibility alone. Civil Rights Act

of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

22. *Civil Rights Key 46*

Attorney's fees due plaintiffs who prevailed in civil rights action brought against employer and international regional and local unions which engaged in discriminatory employment practices would be charged one-half to employer and one-half to unions. Civil Rights Act of 1964, §§ 701, 703(a)(1), 42 U.S.C.A. §§ 2000e, 2000e-2(a)(1) and § 1981; National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

23. *Labor Relations Key 766*

Evidence failed to establish that international, regional, or local union breached their duty of fair representation of union members who were members of minority groups and who were discriminated against by existence of dual seniority system which locked in past discriminatory employment practices. National Labor Relations Act, § 1 as amended 29 U.S.C.A. § 151.

24. *Labor Relations Key 219*

Mere fact that union acquiesced in seniority system that perpetuated past discrimination did not give rise to breach of their duty of fair representation. National Labor Relations Act. § 1 as amended 29 U.S.C.A. § 151.

25. *Labor Relations Key 219*

In order for union to be guilty of breaching its duty of fair representation there must be evidence that union acted unfairly or unimpartially or not in

good faith or with hostile discrimination. National Labor Relations Act, § 1 as amended 29 U.S.C.A. § 151.

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Sidney Ravkind, Mandell & Wright, Houston, Tex., for plaintiff Leonard M. Ramirez.

L. G. Clinton, Jr., Fulbright, Crooker & Jaworski, Houston, Tex., for defendant Western Gillette, Inc.

L. N. D. Wells, Jr., G. William Baab, Mullinax, Wells, Mauzy & Baab, Dallas, Tex., for defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Southern Conference of Teamsters.

James P. Wolfe, Houston, Tex., for Local Union 988, Teamster, Freight, Tank Line and Automobile Industry.

SINGLETON, District Judge.

Memorandum and Order:

These cases involve the question of facially neutral seniority systems and their effect on past discrimination in employment.

These two cases alleging racial discrimination in employment were consolidated and tried before the court. Plaintiff Sabala is a Mexican American who works in Houston, Texas, for defendant Western Gillette, Inc., a nationwide trucking firm, and brings his suit as a class action. Plaintiff Ramirez is also a Mexican American who currently works for Western Gillette, Inc., in Salt Lake City but who worked in Houston during the period in question. He brings his suit individually.

The defendants are Western Gillette, Inc., and three union organizations. These unions are International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Southern Conference of Teamsters, and Local 988, Teamster, Freight, Tank Line and Automobile Industry. Local 988 is the collective bargaining representative for the truck drivers at the Western Gillette terminal in Houston, Texas, and it is a member of both the Southern Conference of Teamsters and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Against all the defendants Sabala and Ramirez and the class plaintiffs have filed suit under 42 U.S.C. § 2000e et seq. (the Civil Rights Act of 1964) and 42 U.S.C. § 1981 (the Civil Rights Act of 1866). They allege basically two causes of action. In each cause plaintiff Sabala, both on his own behalf and as representative of a class pursuant to Fed.R.Civ.P. 23(b)(2), seeks a declaratory judgment, injunctive relief, damages, and attorneys' fees. By an order entered before trial, this court defined the class of persons plaintiff Sabala is entitled to represent as follows: "All Mexican Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas." Plaintiff Sabala in the first cause of action has alleged that defendants Western Gillette, Inc. [hereinafter referred to as "Employer" or "Company"], International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [hereinafter referred to as "International"] and Southern Conference of Teamsters [hereinafter referred to as "Southern Conference"]. Local Union 988, Teamster Freight, Tank Line and Automobile Industry [hereinafter referred to as "Local"], have entered into

collective bargaining agreements which provide for separate seniority for "city" and "road" employees at the Houston terminal, with each class having its own seniority roster. "City" drivers are those who drive principally in Houston and make short runs inside the city limits, whereas "road" drivers make long hauls between different cities. Plaintiffs allege that the conditions imposed on transferring between "city" and "road" are so onerous that the effect is that it is impossible to transfer. It is alleged that the agreements in effect require a city driver to forfeit all "job seniority rights" when he transfers to a road position. In addition, plaintiff alleges, upon transfer from city to line, the driver is placed upon a probationary period during which time he can be discharged. Although there is some dispute as to the truth of this allegation, the court feels that a letter, written to plaintiff Sabala on October 14, 1971, which waived the 30-day probationary period, conclusively establishes the existence of this further burden on transfer from city to line position. The effect, purpose, and intent of the policies and practices pursued by defendants have been and continue to be to limit, segregate, classify, and discriminate against Mexican Americans and Black employees in equal employment opportunities secured to them by the provisions of Title 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. Plaintiffs argue that while nondiscriminatory on its face, the bargaining agreements creating separate seniority systems perpetuate and continue past discriminatory practices of the defendants and thus lock in past discrimination.

In the second cause of action, plaintiffs allege that the defendants International, Southern Conference, and the Local have violated their duties of fair representa-

tion imposed upon them by the National Labor Relations Act, 29 U.S.C.A. § 151, in that they have knowingly acquiesced, joined, or conspired in the allegedly unlawful discriminatory practices and policies complained of and have failed to protect Black and Mexican American employees of defendant Employer from said alleged discriminatory policies and practices.

Plaintiff Ramirez basically has the same cause of action as Sabala and the class. Therefore, his case was consolidated with that of the class, and this court's findings with respect to the class apply to plaintiff Ramirez also.

The trial was ordered bifurcated by this court and this opinion will deal basically with the questions of jurisdiction and liability with some discussion of remedy. Pursuant to the findings as to these two issues, there will be another hearing as to the question of specific remedy and damages, if any.

THE CLASS MAINTAINABLE

[1] As stated earlier, this court before trial had ruled that a class action was maintainable. Fed.R.Civ.P. 23 provides that an order authorizing a class action may be amended or redefined at any time before a decision on the merits. This court, however, declines to amend its order authorizing the class action previously stated. There is little question that the requirements of rule 23(b)(2) have been met. Rule 23(b)(2) is the normal vehicle for civil rights class actions and the allegations and evidence that the defendants have acted on grounds generally applicable to the class thereby making appropriate injunctive relief with respect to the class as a whole demonstrate this suit easily falls within the rule 23(b)(2) class structure. Defend-

ants basically argue that three prerequisites of rule 23(a) are not met. First, they argue that the class is not so numerous as to make joinder of the individual plaintiffs impracticable. This is a requirement of a class action under rule 23(a)(1) but the court reaffirms its earlier rulings that joinder of all members is impractical. As earlier stated, the class plaintiff is allowed to represent is as follows: "All Mexican Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas." The total number of potential class members under this court's definition was thirty-nine. Of that number, one has been eliminated by termination of his employment, and approximately twelve have opted out of the class. Thus, there are twenty-six members of the class. This court holds that this number is great enough along with other factors such as the expediency of the joinder of all the potential plaintiffs, the inconvenience of trying individual suits, and the ability of the individual litigants to institute an action on their own behalf. See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (D.C. Pa. 1968).

[2, 3] Secondly, defendants argue that a class action is not appropriate in this case because each member of the class will need to show individual evidence of discrimination and injury therefrom and, therefore, in effect there are no common questions of law or of fact. This court rejects this contention. The suits to enjoin racial discrimination in employment are by their nature appropriate for class actions. Wright & Miller, Federal Practice and Procedure § 1776. Here, even though some relief might need to be fashioned individually, the common questions of law and fact

as to whether there was discrimination as to the class of Mexican Americans and Blacks is enough to satisfy the requirement of rule 23. See Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

[4] Finally, the Local raises one other problem as to the maintenance of a class action. It argues that Mexican Americans cannot sue under § 1981 and plaintiff Sabala cannot adequately represent a class under § 1981. This court has already held that § 1981 protects aliens from discrimination. Guerra v. Manchester Terminal Corp., 350 F.Supp. 529 (S.D. Tex. 1972). This same reasoning would apply to Mexican Americans who are discriminated against on the basis of their ethnic heritage. In any event, in this court's pretrial order the parties stipulated as to jurisdiction under § 1981. This court holds that plaintiff Sabala can adequately represent the class of both Mexican Americans and Blacks and declines to modify its original order.

[5] At trial, plaintiffs suggested that the class should be broadened to include minority teamster employees employed by Western Gillette in the entire Southern Conference. This court declines to broaden the class from the class previously defined. Even though the evidence shows discrimination against defendant Company's Houston minority employees with respect to transfer to other southwest area terminals, the issue of whether there was discrimination against defendant's employees in other terminals is not before this court. This court without notice to unions and employees at other terminals will not expand the class beyond

the limits all parties acted under in their trial preparation and presentation of evidence. Thus, the class and the relief are restricted to minority employees who are or were at the Houston terminal.

JURISDICTION

Before reaching the questions of liability and remedy, this court must first discuss the question of jurisdiction. Plaintiffs have sued two sets of defendants: (1) the defendant Western Gillette Company, Inc., and (2) the defendant unions. Jurisdiction over the defendant Company is alleged under 42 U.S.C. § 2000e and 42 U.S.C. § 1981. 42 U.S.C. § 2000e-2(a)(1) reads as follows:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 1981 reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to

> sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1981 prohibits private racial discrimination in employment by both employers and labor unions. Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970). It is clear that jurisdiction over the defendant Company is validly alleged under both of these provisions. Jurisdiction over the defendant unions is alleged under these two provisions and, in addition, under 29 U.S.C. § 151 et seq. and the concept of unions duty of fair representation.

[6] The unions agree that this court has jurisdiction under § 1981 and under the duty of fair representation but attacks this court's jurisdiction under 42 U.S.C. § 2000e et seq. on the grounds that plaintiff failed to file a charge against the defendant unions with the Equal Employment Opportunity Commission. This point is a valid one and this court holds that there is no jurisdiction against the unions under 42 U.S.C. § 2000e. The case of Miller v. International Paper Company, 408 F.2d 283 (5th Cir. 1969) is directly in point. That case held that an employee may not bring suit against a union under Title VII unless the union has first been charged in a complaint brought by the plaintiff before the EEOC.

LIABILITY

Having disposed of the jurisdictional issues involved, this court may now reach the merits of plaintiffs' case. The evidence at trial basically is as follows. The drivers of Western Gillette, as is true of most drivers throughout the country, are divided into two main classifications. The first classification is for drivers who basically drive short hauls in the city [hereinafter referred to as "city drivers"]. The second classification is for drivers who make long hauls between cities [hereinafter called either "road" or "line drivers"]. At least in the southern United States, generally road drivers have been predominately white. It was testified to and this court finds as credible that one main reason for this was that minority drivers were not able to find accommodations along the road in many southern states. Historically, road drivers have earned more than city drivers and road driving has been considered a more lucrative position than city driving. This situation is changing because the road drivers' pay has not increased at as great a rate as the pay of city drivers. Other than that, the principal difference between road and city driving is that in city driving you are able to live at home but you must be able to maneuver a truck in city traffic and in tight situations. Road drivers, on the other hand, have more freedom and do not have to have the skills in maneuvering a truck intricately that city drivers have but must remain many hours away from home.

Plaintiffs are drivers of Western Gillette and allege that Western Gillette and the unions have discriminated against them. Plaintiffs use a two-pronged theory to show discrimination. First, plaintiffs claim that minority

drivers were overtly discriminated against in hiring and transferring to road driving positions. Secondly, they allege that the seniority provisions applicable to transferring from one driving classification to another, although on their face applying equally to white and minority drivers, have the effect of "locking in" this past discrimination. These seniority provisions, agreed to between union and Company representatives as part of the collective bargaining agreement and the practices pursuant to this agreement, will be more fully explained later. Basically, however, they provide that if a driver transfers to a new classification he retains his seniority date with respect to when he hired on with the Company (e.g., for pension purposes) but must begin as a new man with respect to his seniority in competing with other men for driving assignments in his new classification.

[7] This court finds that members of the class and plaintiff Ramirez have been discriminated against in transferring to road positions with Western Gillette. This conclusion is based upon direct evidence of overt discrimination by Western Gillette as well as by statistical evidence.

Plaintiff Ramirez began employment for Western Gillette in August of 1966 as a city driver. It was testified to that a short while thereafter, in approximately October 1966, he sought to transfer to line employment. He was discouraged from seeking to transfer and when he later persisted to seek to transfer was told that he would have to quit his job as a city driver and then submit an application for the line and that there was no line position open at that time.

Plaintiff George Williams, a city driver for Western Gillette since 1954 with 17 years previous experience as a road driver, testified he was told in 1958 by the Company's terminal manager that "there was no such thing as Negro road drivers for Western Gillette." In 1964, after hearing about the Civil Rights Act, this plaintiff again asked the Company's terminal manager about road jobs. The then terminal manager walked off. In 1965, he asked the terminal manager, who told him that he would lose his seniority and nine times out of ten lose his job. As a result of this advice, plaintiff Williams, in his capacity as job steward, told other minority city drivers who asked him about the possibility of their obtaining road positions that they might lose their jobs. He further testified that he understood from the Company that upon transfer a new road employee would be subject to the 30-day probationary period in which he could lose his job.

Plaintiff Luther Thomas testified that he asked the terminal manager about the possibility of a road job but was advised that he would lose all of his seniority to which he replied that he would still like to try for the job but was not given an application.

Plaintiff Alfonso Adams testified that the Company's operations manager in Houston told him that he would have to resign his city job first and then go home, and the operations manager would consider giving him a road job. Adams testified that the operations manager told him, "You'll have to quit and start all over again like a new employee."

Plaintiff Oliver Sabala testified that he asked supervisory personnel at the Company in 1967 for road

work but was told by the supervisory personnel that he might get them both run off from the Company if he pushed for it. Sabala further testified that this supervisory person said that the Company did not hire "his" people on the road. In November 1968, Sabala went on the board as a regular city employee. Thereafter he testified that he continually inquired about road jobs of the road dispatcher and was regularly turned down.

Evidence was submitted that the Company kept records of the race of its drivers at its headquarters at least as to plaintiff Alfonso Adams, on his 1963 employment application; as to plaintiff Leonard Ramirez, on his post-1965 employment application and on its seniority list of road drivers as of August 26, 1971, which was distributed to its terminal manager in Van Horn, Texas, which list was not used for EEOC reporting purposes.

In addition, and perhaps more importantly, the statistics of Western Gillette and its Houston terminal indicate that there has been discrimination. The Houston terminal of Western Gillette is in the Company's "southwest area" although it is in the "Southern Conference" of the Teamsters Union. The southwest area currently consists of terminals at Houston, Texas, Van Horn, Texas, Dallas, Texas, Oklahoma City, Oklahoma, and Memphis, Tennessee. The evidence in this case demonstrated that there were 127 line drivers working for Western Gillette in the Southern Conference in 1965. At the present time there are 125 line drivers employed in the Southern Conference; 77 have been hired as new employees since 1965, all White. Two Blacks work as line drivers in the Southern Conference, however, neither of them is a new hire. Dan Haggerty

transferred from Miami, Oklahoma, to the road in Dallas, Texas, in December 1968, and George Williams transferred from city delivery work in Memphis to line work in Memphis in 1971. There is one Mexican American line driver, Ortis, who transferred into the Southern Conference in 1960 after being hired in Los Angeles in 1955. He continues to work as a line driver out of Houston although he is presently physically incapacitated. As far as the Houston terminal is concerned, Western Gillette has approximately 29 drivers. Of these currently only one is Mexican American and there are no Blacks. The composition of the city drivers in Houston, however, is radically different. The 11 drivers hired during or prior to 1956 are all Blacks. Of the 54 drivers hired during and since 1957, 23 are White, 25 are Black, and 6 are Mexican American.

These statistics demonstrate a pattern of discrimination against minority road drivers at Houston by Western Gillette. Of the 29 road drivers at Houston, only one is of a minority group. Of the 65 city drivers at Houston, 42, well over half, are either Black or Mexican American. "In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts." Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (5th Cir., 1970). Defendants argue that since some minority drivers have now or have in the past been road drivers at Houston or for other southwest area terminals, the statistics do not indicate discrimination. Defendants in effect contend that statistics cannot show discrimination unless there is one hundred percent discrimination. This court cannot accept this theory. Both under the Civil Rights Act of 1964 and under § 1981 tokenism cannot be

countenanced. These statistics and evidence presented at trial indicate that there has been discrimination. The fact that this discrimination is somewhat subtle in that there is not one hundred percent discrimination does not make this fact any less invidious.

Plaintiffs allege this discrimination is a result of past discrimination on hiring and on transfers and that the statistics demonstrate this discrimination is locked in by the present seniority system in effect at Western Gillette's Houston terminal. As noted earlier, there are two classifications for drivers at Western Gillette at its Houston terminal—road and city. These two classifications each have their own seniority system. When a driver joins Western Gillette, he is accorded certain rights, such as date for his pension, on the basis of his seniority. This is called "company seniority." Although there is testimony to the contrary, this court finds that a driver keeps his company seniority when transferring from road to city or vice versa. But there is a second type of seniority called "job seniority." Each driver has job seniority from the time he became a driver in the classification in question. Job seniority is the seniority which is used for bidding for the most sought-after trips. A driver with the highest job seniority is the last person to be laid off and is the one who gets his choice of assignments within his classification. If a driver transfers from one classification to another he retains his company seniority but loses his job seniority. In other words, if a driver joins Western Gillette in 1965 as a city driver and transfers to a road position in 1970, the date of his company seniority is from 1965 but he must begin again from 1970 with respect to his job seniority as a road driver. Obviously this dual system of seniority

acts as a deterrent to transfer from one classification to the other and plaintiffs allege that this has the effect of perpetuating past discrimination against minority employees becoming road drivers.

The two leading cases in this area of locked-in discrimination are Bing v. Roadway Express, Inc., 444 F.2d 687 (5th Cir. 1971) and Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970). In *Bing*, Roadway Express had a policy that if an employee transferred from city to road he must resign his position and thereby forfeit all employment rights. He must then apply for the new position as if he were a stranger, with no assurance prior to resigning his job that he would be hired for the new position. In *Jones*, there was also a no-transfer policy between city and road position.

[8] In those cases, the respective courts held the effect of the facially-neutral policy against transfer was to lock in past discrimination and the result was that minority drivers were denied access to road positions. In *Bing* the Fifth Circuit points out the fact that just because the seniority system and transfer limitations apply equally to White and minority drivers is no justification if the result is that it locks in past discrimination:

> "In defense of the policy Roadway argues that the rule has been applied equally to both black and white employees and has prohibited transfers from the road driver unit to the city driver unit as well as from the city unit to the road unit. True though this may be, it is not a satisfactory answer to Bing's contention that in actual effect the facially neutral policy is discriminatory. Those

> white drivers who were employed as city drivers presumably had the opportunity to apply as road drivers but either were not qualified or preferred city work. Unlike Bing, the white drivers were not barred from the position of road driver by virtue of their race. Consequently, though the no-transfer policy may serve to keep all drivers in their present positions, the discriminatory hiring practices in effect at the time Bing was employed colors the policy, when applied to Bing and members of his class, with a distinctively discriminatory tint." Bing v. Roadway Express, Inc., 444 F.2d 687 at 690.

Defendants argue that the instant case is different from *Bing* and *Jones* in that in *Bing* and *Jones* there was either a no-transfer policy or what in effect is the same thing in that if an employee transferred from city to road he had to start over as a new employee. In our case, so defendants' argument goes, the employee only loses his job seniority and he keeps his company seniority and is not treated as a stranger to the company. This is clearly a distinction between the instant case and *Bing* and *Jones* and, apparently, this problem of how far the concept of locked-in discrimination reaches is one of first impression before the federal courts. Further, in *Bing* and *Jones* there were no minority drivers who were road drivers unlike the present case where there are some. But even though the facts are different, this court holds the result is the same: discrimination. This court repeats what it said earlier, just because the discrimination is more subtle than in *Bing* and *Jones* does not make it any less invidious. The dual seniority system here as in *Bing* and *Jones* locks in past discrimination because

it discourages to a large extent minority employees from transferring from city to road.

[9] Defendants further argue that there can be no discrimination in road employment if there are no openings in road employment. Defendants have presented evidence that Western Gillette's business at the Houston terminal has declined and there have been in the last few years always some road drivers laid off. Thus, defendant argues that the reason minority members have not been able to transfer to road positions is because there were no positions available. But the fact is that there were new road drivers during the period in question and that "casuals" have forced on to become road drivers. A casual is someone who is hired by the Company to work temporarily during periods of high volume. Under the bargaining agreements between Company and unions and the interpretations of these bargaining agreements a casual road driver (other than a regular driver on layoff working as a casual) can force an employer to take him on as a regular employee if he has worked and has made himself available for work for a continuous period of thirty-one days. During the period from 1968 to 1971, there were seven men who forced on at Houston as line drivers. Defendant Western Gillette argues that this does not indicate there were positions available for these drivers during this period but only that the terminal manager was lax in his work assignments and inadvertently let casuals work enough hours to force on when there were not positions for them. The Company's lack of intent may be correct. However, seven men were hired from 1968 to 1971 as road employees none of whom were minority drivers. This court, therefore, holds that there were positions avail-

able during this period. Even if there were no positions available, this court would still not countenance discrimination. Neither Company nor unions can have a dual seniority system that locks in past discriminations even if there happens to be no positions available at the time. This is because this court holds that should a position become available minority employees would be automatically discriminated against in obtaining this position because of the discriminatory dual seniority system.

[10] Western Gillette as proof of its sincerity as being against discrimination points to a campaign in 1968 to hire minority drivers as road drivers throughout its operations in the United States. In an effort to recruit road drivers at Chicago and at Miami, Oklahoma, advertisements were placed in Chicago and direct contact was made with minority groups both there, here, and in Los Angeles. However, as far as this court can determine the Company did not do anything more in Houston other than offer these road openings to the one Black union steward. Laudable efforts and sincere statements by Company officials do not alter the fact that there was past discrimination and that the dual seniority system although facially neutral has the effect of locking in this past discrimination. Present good faith on the part of the Company and the unions has little relevance to the difficult question of facially neutral but in fact discriminating seniority systems.

[11, 12] Having determined that the employer has discriminated in the past and that the present policy of the dual seniority system perpetuates the past discrimination, the next issue is whether the present policy is justified by showing a business necessity. "When an employer or union has discriminated in the past

and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose." Local 189, United Papermak & Paperwork v. United States, 416 F.2d 980 at 989 (5th Cir. 1969). If there is an overriding legitimate nonracial business purpose, this is a defense under a § 2000e suit. However, the evidence in this case does not indicate any such legitimate, nonracial business purpose that would justify what this court has found to be racial discrimination in the hiring and transfer practices of Western Gillette as they relate to the city and road drivers. It is clear to the court that the discrimination as found by the court is and was practiced both by the Company and by the unions within the aegis of § 1981.

[13-16] The limits of § 1981 suits against labor unions have not been fully defined by the courts yet. However, at least one court has held that acquiescence in "locked-in" discrimination by a local union is a violation of the § 1981 prohibition against discrimination in the right to contract. Johnson v. Goodyear Tire and Rubber Co., 349 F.Supp. 3 (S.D.Tex. 1972). This surely should be so—the local union which signed the agreements providing for separate seniority rosters and which is the agent of its employees has a duty to protect its members against discrimination. This court also holds the Southern Conference and the International violated § 1981. Officials of these two organizations were intricately involved in the contract negotiations that led to the agreements in question. See Eagers v. Yellow Freight System, Inc., 4 F.E.P. Cases 1297 (N.D.Ga. No. 14510, July 21, 1972). The negotiations for the agreements are conducted on a nationwide

and regionwide basis between committees made up of Southern Conference and International officials, and the local actually has little to do with the formulation of the agreements other than the formality of signing it. The International and Southern Conference argues, however, that the agreements providing for dual seniority are not on their face discriminatory and they had no notice that there was discrimination at the Houston terminal. This is not enough of an answer. These union organizations have a duty under § 1981 to inquire into the effect of the contract provisions when it is reasonable to assume, as it is here, that they might lead to discrimination. Unions under § 1981 have an affirmative obligation to protect members from illegal discrimination. This duty includes the responsibility to determine if the agreements they help negotiate lock in any such past discrimination.

REMEDY

[17] Having determined that Black and Mexican American employees of Western Gillette at its Houston terminal were discriminated against, both under the Civil Rights Act of 1964 and the Civil Rights Act of 1866, this court must now determine the remedy to be given these aggrieved plaintiffs. The question of remedy is a complex one because of the conflicting interests of plaintiffs and the various defendants as well as the many employees that will be affected by this court's order. This court must first deal with the question of the dual seniority system. This dual seniority system has locked in past discrimination against minority groups at the Houston terminal. But this court feels that it would be too drastic a remedy to completely merge the two seniority systems. Such a remedy would

have various major shortcomings. It would prejudice recently hired or transferred road drivers including minority drivers because they could be bumped off their job by city drivers with lower seniority on the city roster. Further, city employees who during the early years of their employment have enjoyed a weekly guarantee and consequent higher pay as compared to similarly situated road drivers would be permitted to move to the road with a resulting freeze of lower seniority men in the least attractive low-paying road jobs. Top seniority city drivers who could not meet traffic skills and the driving skills required of them would be able to bump into the most attractive road positions. This court is persuaded that doing away with the dual seniority system entirely and having only one seniority roster would, therefore, create chaos and be detrimental to both minority and non-minority employees as well as the Company. In questions of this kind, the court must tread softly and must fashion a remedy which has the least destructive effects on both Company's and employees' desires while at the same time obviating the effects of past discrimination.

[18] As suggested by plaintiff in his Post Trial Memorandum, the following changes will be ordered to be placed into effect:

1. As to the class previously defined who evidence a desire to accept road employment at any Western Gillette terminal in the Southern Conference, the Company is ordered to avail such persons the opportunity to transfer, with seniority dating to the date they would otherwise have sought road employment but for the discriminatory practices, but in no event will such seniority date be earlier than July 2, 1965. As to

such transfers, the union defendants are enjoined to not oppose their effectuation.

2. Any individual who transfers pursuant to 1, above, and whose date of employment as a city driver is earlier than his new seniority date on the road, shall have his accumulated city seniority frozen, and at any time after six months as a road driver, shall be able to return to a city position with such accumulated city seniority.

3. As to future operations of the Company, after the effective date of this relief, all employees of the Company shall be entitled to move freely from city to road and from road to city. Upon such transfer, the transferee shall go to the bottom of the roster of the classification to which he is transferring, but he shall retain his accumulated seniority in the classification from which he has transferred. If, after six (6) months, the person desires to return to his former classification, he may do so on the basis of his frozen accumulated seniority rights in such former classification.

4. Those persons who have previously transferred from city to road or from road to city, and who, in so doing, lost their accumulated seniority in their former classifications, shall have such lost accumulated seniority restored for the purpose of exercising their seniority rights should they, in the future, desire to return to their former classification.

5. Any person who requests to be transferred either from city to road or from road to city must meet all reasonable qualifications relating to his ability to perform the job to which he requests a transfer.

6. As to all of the above, the Company is ordered to implement the necessary changes, and the union is enjoined from opposing such implementation.

This court feels that the above remedy would be the most appropriate means to destroy the effects of past discrimination on members of the class. The reason class members who were discriminated against may transfer to any terminal in the southwest area and not just the Houston terminal is that the evidence shows that Houston city drivers were discriminated against in transferring to road positions at the Houston terminal. The full dual seniority system remains in effect for nonminority city drivers since this is what the employer and employees desire as evidenced by their actual practice and their collective bargaining agreements.

[19-21] This court orders the Company and the unions to implement the above remedy and enjoins both the Company and the unions from interfering with these changes or with the rights of members of the class to act pursuant to this relief. The plaintiffs also seek monetary damages, basically in the form of back pay. This is a rule 23(b)(2) class action which is used when the representatives of the class are seeking final injunctive relief or corresponding declaratory relief. It is used when the relief sought is primarily injunctive or declaratory relief. However, it is also permissible in a rule 23(b)(2) class action to seek and obtain back pay as part of the injunctive relief needed to obviate past discrimination. See Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Robinson v. Lorillord Corp., 444 F.2d 791 (4th Cir. 1971); Wright & Miller, Federal

Practice and Procedure § 1775. This court holds that members of a class who would have transferred to road positions or who would have hired on as road positions absent discrimination are entitled to back pay equaling the difference between the salary they did receive and the salary they would have received absent discrimination. The second half of this bifurcated trial will be held on the question of implementing the court's remedy and on the question of back pay damages and attorneys' fees and evidence will be presented on these issues at that time. This court holds that any difference in pay will be paid to the members of the class by the defendant Company. The Company maintains that it is not liable for the dual seniority system. However, the Company in its collective bargaining agreements with the unions agreed to accept the principle of seniority under the different contracts as a basis for assignments of work for its employees. At the very least the Company knew of the dual seniority system and accepted it. Further and more importantly, the testimony of witnesses and the statistical evidence show that the Company discriminated against members of the class who desired to become road drivers. The Company may not evade its burden of having to pay to rectify this discrimination by saying the seniority system is the unions' responsibility alone.

[22] The question of attorneys' fees involves an allocation of responsibility for this discrimination among the various defendants. The 1964 Civil Rights Act provides that the court, in its discretion, may allow the prevailing party reasonable attorneys' fees as part of the costs. 42 U.S.C.A. § 2000a-3(b). The Fifth Circuit has held that in a § 1981 action the court may also award attorneys' fees. Jinks v. Mays, 464

F.2d 1223 (5th Cir. 1972). All defendants argue that they have no responsibility for the discrimination. As noted earlier this court holds that the primary responsibility for the discrimination against the class is the Company's since the Company is the one that practiced overt discrimination in transferring which resulted in locked-in discrimination of the dual seniority system. Both the International and the Southern Conference, on the one hand, and the Local, on the other hand, argue that because of the collective bargaining structure they have nothing to do with any discrimination. The unions' attempts to wash their hands of the discrimination must fail. As far as the Local is concerned, it acquiesced in the discrimination practiced against its members. Further, the Local gave a written power of attorney to a bargaining committee representing the Southern Conference of Teamsters (the National Teamsters Union is divided into various regional conferences, one of which is the Southern Conference) which negotiated the contract. The bargaining agreement authorizing this seniority system was signed by the Local and also negotiated by an agent of the union and, therefore, the Local is responsible for it. International and Southern Conference argue that any discrimination is a matter between the Company and the Local. These unions argue that neither International nor Southern Confererence was a bargaining agent of the Local. To understand this contention reference must be made to the manner in which collective bargaining arguments are reached. The basic nationwide contract between the Teamsters Union and employers throughout the country is the National Master Freight Agreement. This is negotiated by committees representing local unions and various employers. Incorporated into the National Master

Freight Agreements are various supplemental agreements entered into between negotiating committees for the Teamsters locals in the conference in question and committees for the employers in the conference. These supplemental agreements affecting the class in this suit are the Over-the-road Supplemental Agreement and the Local Freight Forwarding Supplemental Agreement for the Southern Conference and they are signed by the local union. Even though in theory perhaps neither the Southern Conference nor International are part of the agreements, in practice the negotiating committee is made up of International and Southern Conference officials at least in part responsible for its outcome. As this court said earlier, all union organizations violated their duty under § 1981 to protect the class from discrimination. Therefore, this court allocates attorneys' fees as follows: one-half to be paid by the Company, the other one-half to be paid equally by the three union organizations.

[23-25] Plaintiffs have also sued defendant unions alleging a breach of duty of fair representation under 29 U.S.C. § 151. The landmark case on the duty of fair representation is Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). This case held that a bargaining representative of employees has a duty "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." Steele v. Louisville & Nashville R.R. Co., *supra* at 202, 203, 65 S.Ct. at 232, 89 L.Ed. at 183. This court holds that there has been no breach of duty of fair representation by any of the union defendants. The unions have acquiesced in a seniority system that perpetuates past discrimination but that does not give

rise to a breach of their duty of fair representation. To breach this duty there must be evidence that the unions acted unfairly or unimpartially or not in good faith or with hostile discrimination. Richardson v. Texas & New Orleans R.R. Co., 242 F.2d 230 (5th Cir. 1957).

To sum up, the class plaintiff Sabala may represent is all Mexican Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas. Plaintiff Sabala and the class he represents and plaintiff Ramirez have proven discrimination against the defendant Employer under § 1981 and § 2000e and against the defendants Local, Southern Conference, and International under § 1981. Both Company and unions are to some extent responsible for this discrimination although the Company has the greater burden of responsibility. Plaintiffs have not shown a breach of the duty of fair representation by any of the defendant unions. This court enjoins all defendants from continuing the discriminatory practices discussed herein and orders the parties to change the seniority system in accord with this opinion. This court recognizes that the parties are far better equipped than this court to formulate a judgment in accord with this opinion that disrupts to as small an extent as possible the practices and agreements of the unions and the Company.

The clerk will notify counsel when the hearing on remedy and damages will be set and at that time counsel are to present evidence as to how best to implement this court's order. Counsel will submit an order, or orders if counsel cannot agree, in accordance with this opinion at that time.

APPENDIX E.

(371 F.Supp. 385)

In the United States District Court for the Southern District of Texas, Houston Division.

Oliver I. Sabala, Individually and on Behalf of All Others Similarly Situated v. Western Gillette, Inc., et al. Civil Action No. 71-H-961.

Leonard M. Ramirez v. Wester Gillette, Inc., et al. Civil Action No. 71-H-1338.

MEMORANDUM AND OPINION

(Filed February 26, 1974)

The trial of these cases involving the question of racial discrimination in employment practices was bifurcated and an order concerning jurisdiction and liability entered July 17, 1973, published at 362 F.Supp. 1142. The hearing on remedies, damages, and costs was held during October and November of 1973. This supplemental Memorandum and Opinion will treat those subjects only. In the areas of remedies, damages, and costs, this Memorandum and Opinion has enlarged upon that of July 17, 1973, and in those areas will supersede the earlier opinion when inconsistencies arise.

Remedy

Having determined that Black and Mexican American employees of Western Gillette at its Houston terminal were discriminated against, both under the Civil Rights Act of 1964 and the Civil Rights Act of 1866, this court must now determine the remedy to be given these aggrieved plaintiffs. The question of remedy is a complex one because of the conflicting interests of

plaintiffs and the various defendants as well as the many employees that will be affected by this court's order. This court must first deal with the question of the dual seniority system. The dual seniority system has locked in past discrimination against minority groups at the Houston terminal. But this court feels that it would be too drastic a remedy to completely merge the two seniority systems. Such a remedy would have various major shortcomings. It would prejudice recently hired or transferred road drivers including minority drivers because they could be bumped off their job by city drivers with lower seniority on the city roster. Further, city employees who during the early years of their employment have enjoyed a weekly guarantee and consequent higher pay as compared to similarly situated road drivers would be permitted to move to the road with a resulting freeze of lower seniority men in the least attractive low-paying road jobs. Top seniority city drivers who could not meet traffic skills and the driving skills required of them would be able to bump into the most attractive road positions. This court is persuaded that doing away with the dual seniority system entirely and having only one seniority roster would, therefore, create chaos and be detrimental to both minority and nonminority employees as well as the Company. In questions of this kind, the court must tread softly and must fashion a remedy which has the least destructive effects on both Company's and employees' desires while at the same time obviating the effects of past discrimination.

This court intends by its order to afford the class members an opportunity to transfer to over-the-road positions heretofore denied them either by outright discrimination or by virtue of their having been "locked

in" as a result of their collective bargaining agreement. Such relief must be broad enough to insure that the transferring discriminatee is able to keep his over-the-road position once he obtains it. Consequently, all transferring discriminatees will carry over with them their "rightful place" seniority date. "Rightful place" seniority represents the earliest opportunity following his qualification at which any discriminatee could have been hired as a road driver. *Bing v. Broadway Express, Inc., et al.*, 5th Cir., October 15, 1973, No. 72-2565. The testimony at trial and the evidence established that of the qualified class members ten would have accepted over-the-road employment anywhere in the Southern Conference and thirteen of the qualified class members limited themselves to over-the-road employment at the Houston terminal. Further, there were over-the-road jobs available in the Southern Conference and in Houston to which the discriminatees would have acceded absent discrimination. Predicated on the foregoing, those discriminatees who would have accepted over-the-road employment anywhere in the Southern Conference (herein called "Southern Conference Discriminatees") have been assigned "rightful place" seniority dates predicated upon the job next available anywhere in the Southern Conference after the date upon which such Southern Conference Discriminatee was qualified to drive over-the-road. As to those discriminatees who limited themselves to over-the-road employment in Houston, Texas (hereinafter referred to as "Houston Discriminatees"), they have been assigned "rightful place" seniority based upon the over-the-road job next available out of the Houston terminal after the date upon which such Houston Discriminatee became qualified to drive over-the-road.

A roster of all discriminatees entitled to relief under this Order is herein set forth reflecting the name of the discriminatee, whether he be a Southern Conference Discriminatee (SC) or a Houston Discriminatee (H), and his "right place" seniority date. Such seniority dates shall be as of 11:59 p.m. on the date designated.

Name	"Rightful Place" Seniority
Raymond O'Neal (SC)	5/31/56
George Williams (H)	1/18/60
Luther Thomas (H)	2/10/63
Alfonso Adams (SC)	6/18/64
Thomas Lindley (SC)	6/20/64
I. V. Phlegm (H)	8/27/64
Frank Fountain (H)	5/03/65
Essie McGregor (H)	5/10/65
Herman Carrier (H)	8/03/65
John Roberson (SC)	9/01/65
Roy Rodrigues (SC)	6/09/66
Henry McTear (SC)	10/11/66
Leonard Ramirez (SC)	5/02/68
Oliver Sabala (SC)	6/18/68
Lewis Norman (H)	4/27/69
Robert Clark (SC)	2/07/69
Charles O'Neil (SC)	2/11/69
Grover Williams (H)	5/01/70
Edgar Williams (H)	6/07/70
Deford Bailey (H)	7/20/71
Charles Lipscomb (H)	7/21/71
Ormogene Dosty (H)	9/01/71
Ellsworth Pinkins (H)	—

Two members of the class previously defined, Frank Golden and Manuel Ellison are eliminated from further consideration for remedial relief or back pay because (a) both responded to defendant Western Gillette's

interrogatories that they would not accept road employment either in Houston or in the Southern Conference, and (b) neither is presently qualified to operate over-the-road equipment.

Jose Fonseca is entitled to no relief in that he has quit his employment and is, therefore, no longer a member of the class as previously defined.

This court finds that discriminatee Frank Fountain was disqualified for employment as an over-the-road driver from July 1, 1972, until June 1, 1973, and, therefore, that any back pay award to the said Frank Fountain will not include an award for the eleven-month period described herein.

This court finds that discriminatee Leonard Ramirez accepted over-the-road employment outside the Southern Conference in August 1972, and, therefore, any back-pay award as to the said Leonard Ramirez shall terminate as of August 1, 1972.

The following changes are hereby ordered to be placed into effect:

1. Within thirty (30) days of this Order, the Company shall inform in writing all class discriminatees whose names appear in the list set forth above of their rights under this Order including the right to transfer to over-the-road driving jobs with "rightful place" seniority carry-over. A copy of such written notice shall be presented to counsel for the class for approval prior to dispatch. The notice shall contain the salient provisions hereinafter set forth in paragraphs 2 through 9.

2. As over-the-road job opportunities occur anywhere in the Southern Conference, such jobs shall

be offered to the discriminatees whose names appear above in the order in which their names appear above. The Company is ordered to offer such persons the opportunity to transfer, with "rightful place" seniority dating to the date set forth opposite such men's names. As to Ellsworth Pinkins, his "rightful place" seniority date shall be the date that the first opening occurs in Houston, Texas.

To the extent that the carry-over of "rightful place" seniority violates the National Master Freight Agreement rule on seniority, that rule is suspended because it violates the Civil Rights Act of 1964. Accordingly, the union defendants are enjoined to not oppose the effectuation of the transfers herein ordered.

The practice of casuals "forcing on" as road drivers was referred to in this court's earlier opinion, 362 F.Supp. 1142 at 1152. This practice should be discontinued because it is the opinion of this court that such practice can be utilized to effect a policy of discrimination relating to road-driver positions. However, such a practice is apparently a part of the present bargaining agreement and for that reason this court is reluctant to enjoin future use of such practice. The court suggests that in connection with future negotiations relating to new bargaining agreements the parties should meet this problem. In the meantime, whenever, in the Southern Conference, a person "forces on" the road board, a job vacancy shall be deemed to have occurred, and the Company shall immediately offer a position at such terminal to the next discriminatee entitled to a job opportunity. As to such transfers, union defendants are enjoined to not oppose their effectuation.

3. If any member of the Southern Conference Discriminatees rejects an opportunity to transfer to an over-the-road driver position at any terminal in the Southern Conference, he shall be deemed to have waived his right to transfer under this Order. If a Houston Discriminatee rejects a job offer at a terminal other than in Houston, his name shall be moved to the bottom of the roster set forth above and he will be afforded one more demonstrable opportunity to transfer to a road position in Houston, Texas, if and when an over-the-road vacancy occurs there.

4. Any discriminatee who transfers to an over-the-road driving job pursuant to this Order or who may have previously transferred (*e.g.*, Leonard Ramirez) shall carry his "rightful place" seniority for all bidding purposes and his company seniority for fringe-benefit purposes. Each tranferring discriminatee shall be slotted into the over-the-road seniority roster at the terminal to which he transfers based upon his "rightful place" seniority so that he may establish his "rightful place" on such roster.

5. Any discriminatee who transfers to an over-the-road position pursuant to this Order shall have a 180-day "retreat" period during which he shall have the right to return to his old job without loss of seniority if he does not wish to continue as an over-the-road driver. Such a return shall be considered a rejection within the meaning of paragraph 3; provided, however, that any discriminatee may waive, in writing, his "retreat" right and by so waiving that right forfeits the privilege of returning to his former job classification with his seniority intact.

6. After each discriminatee has had one demonstrable opportunity to accept or reject over-the-road em-

ployment at any terminal in the Southern Conference, and after each Houston Discriminatee, regardless of whether he rejects an opportunity other than at Houston, has had one demonstrable opportunity to accept or reject any over-the-road position at Houston, Texas, as per paragraph 3, above, the operative provisions of this Order shall terminate. However, the Company is admonished that it should seek henceforth to promote, on a nondiscriminatory basis, from which in the future.

7. Defendant International shall designate one International union official who shall be responsible for compliance with this Order. The International shall give counsel for plaintiff his name within thirty days of this Order. Such individual shall inform all affiliated local unions which represent Western Gillette, Inc., employees of the requirements of this Order and advise them of the necessity of compliance therewith.

8. As to all of the above, the Company is ordered to implement the necessary changes, and the union is enjoined from opposing such implementation.

9. This court shall retain jurisdiction for the purpose of resolving any controversy or problem which may arise in the implementation of this Order which cannot be satisfactorily resolved through normal grievance procedures.

This court feels that the above remedy would be the most appropriate means to destroy the effects of past discrimination on members of the class. The reasons that class members who were discriminated against may transfer to any terminal in the Southern Conference and not just the Houston terminal are that the evidence shows:

(a) That "Modified System Seniority" affords over-the-road drivers the opportunity to "bump" from terminal to terminal in the Southern Conference when they are on layoff;

(b) That at least ten men demonstrated to the satisfaction of the court that they were in the past and continue to be willing to accept over-the-road employment at any terminal in the Southern Conference; and

(c) That the Company freely moves road drivers from location to location within the Southern Conference under "changes of operation." The full dual seniority system remains in effect for all city drivers whose names do not appear in the roster set forth above since this is what the employer and employees desire as evidenced by their actual practice and their collective bargaining agreements.

Damages and Costs

Damages

The plaintiffs also seek appropriate back pay representing the monies they would have earned had they been over-the-road drivers. This is a Rule 23(b)(2) class action which is used when the representatives of the class are seeking final injunctive relief or corresponding declaratory relief. It is used when the relief sought is primarly injunctive or declaratory relief. However, it is also permissible in a Rule 23(b)(2) class action to seek and obtain back pay as part of the injunctive relief needed to obviate past discrimination. See *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Robinson v. Lorillord Corp.*, 444 F.2d 791 (4th Cir. 1971); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCE-

DURE §1775. It is clearly in the discretion of the court, once having found intentional unlawful employment practices, to order, as part of the affirmative action necessary to obviate such unlawful employment practices, that the party responsible for the unlawful employment practices pay to the class members back pay calculated to restore such class members to their rightful economic place. The discretionary authority rested in this court is found in 42 U.S.C. 2000e-5(g), and supported by the Fifth Circuit: "The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion. . . ." *Johnson v. Georgia Highway Express, Inc., supra.*

This court holds that members of the class previously described are entitled to back pay equaling the difference between the salary they did receive as city drivers and the salary they would have received as over-the-road drivers absent discrimination. The court finds that it is not necessary as a prerequisite of an award of back pay to a class plaintiff that such class plaintiff had to apply for a position and be denied a position for discriminatory reasons at a time a position was available. Accordingly, the court concludes, as a matter of law, that proof of discrimination against an individual member of the class is not a prerequisite to an award of back pay to that individual member of the class. See *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). No back pay shall be computed for time after July 17, 1973, when this court by its prior Memorandum and Order ordered that the discriminatory practices be terminated.

This court has found that a reasonably prudent over-the-road driver for Western Gillette, Inc., expends approximately 10% of his gross annual pay in connection with his employment as an over-the-road driver, consequently, as to any back pay determined to be due any discriminatee herein, such amount otherwise determined due such discriminatee shall be reduced by an amount equal to 10% of such amount. This court has heard testimony from all discriminatees with regard to "interim earnings," and finds that the evidence adduced is not sufficiently definite to show that such "interim" or "moonlight" earnings were of the type that such discriminatees could not have earned had they been employed as over-the-road drivers. In connection with such earnings, counsel for the class has agreed to furnish counsel for the Company all discriminatees' earnings data for the years 1968 through 1973, and counsel for the class is ordered to do so as a condition precedent to the payment of any back pay to any discriminatee. The court will retain jurisdiction to resolve disputes concerning the matters of "interim" or "moonlight" earnings insofar as such earnings might operate to reduce the amounts of back pay due each discriminatee. Finally, no discriminatee shall be paid any monies due him under this Order until such discriminatee shall have accepted an over-the-road job and remained in such job beyond the 180-day "retreat" period unless such discriminatee waives such "retreat" period in writing in which case he shall be paid at the time of such waiver, provided, however, if all discriminatees are not afforded one demonstrable opportunity at over-the-road employment within a period of one year of the date of this Order, the court will reconvene counsel for the purposes of ascertaining

the reasons therefor and ordering such further affirmative action, if any, which may be necessary to implement this court's Order.

In this second half of the bifurcated trial, substantial expert testimony and supporting data was offered by both counsel for plaintiffs and counsel for the Company with regard to the matter of determining the difference in what a discriminatee earned as a city driver and what he would have earned as an over-the-road driver. The matter of computation of back pay for each member of a class of discriminatees, at trial, is a question of first impression. The variety of formulae by which individual back pay due this class of discriminatees can be computed is bewildering; the record of the second part of this bifurcated trial is replete with such formulae. Having carefully considered all of such formulae as were advanced, this court adopts the formula of Dr. Richard A. Tapia which is contained in court's Exhibit 2. By that formula, a reasonably prudent (*i.e.*, representative) road driver and a reasonably prudent (*i.e.*, representative) city driver, each having characteristics representative of their peers with regard to seniority, earnings and work habits were selected. Thereafter, the average monthly earnings of the representative road and city driver for the period embracing June 3, 1968, through July 17, 1973, were compared, and a ratio representing such comparison was derived. In this case it was demonstrated that a representative over-the-road driver earns, on a monthly basis, 1.56 times that which a representative city driver earns. The court while recognizing that the method of damage calculation determined by it contains a statistical disparity and does not measure what the plaintiffs would have earned had they been given the first available

opportunity to transfer to a line position, nevertheless, holds that the 1.56 factor is based upon the average road driver earnings as against the average city driver earnings based upon the seniority date of the city driver, and that such factor is to be applied to all plaintiffs. Consequently, in order to find the back pay due a particular discriminatee, such discriminatee's earnings for the period June 3, 1968, through July 17, 1973, or from his "rightful place" seniority date through July 17, 1973, whichever is lesser, must first be determined; that figure should then be multiplied by 1.56; the result of such multiplication represents the gross earnings he would have made as a road driver. The resulting figure must, of course, be reduced by (a) the expenses incurred in connection with over-the-road employment which are not incurred in connection with city driver employment (in this case, 10%), and (b) any "interim earnings" of a particular discriminatee which he would not have been able to have earned had he been an over-the-road driver, and (c) the actual amount earned as a city driver.

Based on the conditions of accepting over-the-road employment as set forth above, the defendant Company is ordered to pay to the discriminatees the amounts set forth in court's Final Judgment.

This court holds that the back pay set forth in the Final Judgment will be paid to the qualifying members of the class by the defendant Company. The Company maintains that it is not liable for the dual seniority system. However, the Company in its collective bargaining agreements with the unions agreed to accept the principle of seniority under the different contracts as a basis for assignments of work for its employees. At the very least, the Company knew of the dual

seniority system and accepted it. Further and more importantly, the testimony of witnesses and the statistical evidence show that the Company discriminated against members of the class who desired to become road drivers. The testimony and the statistical evidence demonstrates that there was never a Black or Mexican-American hired as an over-the-road driver in Houston, Texas. The Company may not evade its burden of having to pay to rectify this discrimination by saying the seniority system is the unions' responsibility alone.

Costs

The question of attorneys' fees and other costs involves an allocation of responsibility for this discrimination among the various defendants. The 1964 Civil Rights Act provides that the court, in its discretion, may allow the prevailing party reasonable attorneys' fees as part of the costs. 42 U.S.C.A. § 2000a-3(b). The Fifth Circuit has held that in a § 1981 action the court may also award attorneys' fees. ***Jinks v. Mayes,*** 464 F.2d 1223 (5th Cir. 1972). All defendants argue that they have no responsibility for the discrimination. As noted earlier, this court holds that the primary responsibility for the discrimination against the class is the Company's since the Company is the one that practiced overt discrimination in transferring which resulted in locked-in discrimination of the dual seniority system. Both the International and the Southern Conference, on the one hand, and the Local, on the other hand, argue that because of the collective bargaining structure they have nothing to do with any discrimination. The unions' attempts to wash their hands of the discrimination must fail. As far as the Local is concerned, it acquiesced in the discrimination prac-

ticed against its members. Further, the Local gave a written power of attorney to a bargaining committee representing the Southern Conference of Teamsters (the National Teamster Union is divided into various regional conferences, one of which is the Southern Conference) which negotiated the contract. The bargaining agreement authorizing this seniority system was signed by the Local and also negotiated by an agent of the union, and, therefore, the Local is responsible for it. International and Southern Conference argue that any discrimination is a matter between the Company and the Local. These unions argue that neither International nor Southern Conference was a bargaining agent of the Local. To understand this contention reference must be made to the manner in which collective bargaining arguments are reached. The basic nationwide contract between the Teamsters Union and employers throughout the country is the National Master Freight Agreement. This is negotiated by committees representing local unions and various employers. Incorporated into the National Master Freight Agreements are various supplemental agreements entered into between negotiating committees for the Teamsters locals in the conference in question and committees for the employers in the conference. These supplemental agreements affecting the class in this suit are the Over-the-road Supplemental Agreement and the Local Freight Forwarding Supplemental Agreement for the Southern Conference and they are signed by the local union. Even though in theory perhaps neither the Southern Conference nor International are part of the agreements, in practice the negotiating committee is made up of International and Southern Conference officials at least in part responsible for its outcome. As this court said

earlier, all union organizations violated their duty under § 1981 to protect the class from discrimination. Therefore, this court awards the costs of this action to the plaintiffs; such costs are to be taxed against the defendants and allocated as follows: one-half (½) to be paid by the Company, the other one-half (½) to be paid equally by the three union organizations. Included in such costs, but not limited thereto, are the following:

(a) Expert witness fee for Dr. Richard A. Tapia, who testified on behalf of the plaintiffs and who prepared certain studies at the court's request	$ 3,000.00
(b) Attorneys' fees to Mandell & Wright (Sidney Ravkind), attorneys for Leonard A. Ramirez	$12,500.00
(c) Attorneys' fees for Rosenthal & Rosenblum (Messrs. Henry Rosenblum, Alvin Rosenthal and Ronald Cohen), attorneys for the Class	$35,000.00
(d) Such other and further costs which are ordinarily taxable in litigation of this nature.	

As to (a), (b), and (c), this court finds the amounts set forth therein are reasonable under the circumstances in light of the time spent in preparation and litigation of the cause, the complexity of such preparation and litigation, and the novelty of the issues.

Plaintiffs have also sued defendant unions alleging a breach of duty of fair representation under 29 U.S.C. § 151. The landmark case on the duty of fair representation is *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 191, 89 L.Ed. 173 (1944). This case held

that a bargaining representative of employees has a duty "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Steele v. Louisville & Nashville R.R. Co., supra* at 202, 203; 89 L.Ed. at 183. The evidence on this point was rather meager—almost entirely what this court denotes as "remote circumstantial." For that reason, this court reluctantly holds that there has been no breach of fair representation by any of the unions defendants. The unions have acquiesced in a seniority system that perpetuates past discrimination but that does not give rise to a breach of their duty of fair representation. To breach this duty there must be evidence that the unions acted unfairly or unimpartially or not in good faith or with hostile discrimination. *Richardson v. Texas & New Orleans R.R. Co.*, 242 F.2d 230 (5th Cir. 1957).

To sum up, Plaintiff Sabala may represent all Mexican-Americans and Blacks currently employed by Western Gillette during the pendency of this action as city drivers in Houston, Texas. Plaintiff Sabala and the class he represents and plaintiff Ramirez have proved discrimination against the defendant Employer under § 1981 and § 2000e and against the defendant Local, Southern Conference, and International under § 1981. Both Company and unions are to some extent responsible for this discrimination although the Company has the greater burden of responsibility. Plaintiffs have not shown a breach of the duty of fair representation by any of the defendant unions. This court enjoins all defendants from continuing the discriminatory practices discussed herein and orders the parties to implement the affirmative action relief ordered by this Opinion.

Except as included in this supplemental Opinion, each party's requested proposed findings of fact and conclusions of law have been, and the same are hereby, denied and this supplemental Memorandum and Opinion along with this court's prior Memorandum and Order dated July 17, 1973, as reported in 362 F.Supp. 1142, will constitute the entirety of this court's findings of fact and conclusions of law relating to all aspects of this case.

Done at Houston, Texas, on this the 26th day of February, 1974.

/s/ JOHN V. SINGLETON
United States District Judge

APPENDIX F.

In the United States District Court For the Southern District of Texas, Houston Division.

Oliver I. Sabala, Individually and on Behalf of All Others Similarly Situated, vs. Western Gillette, Inc., et al. Civil Action. No. 71-H-961.

Leonard M. Ramirez, vs. Western Gillette, Inc., et al. Civil Action. No. 71-H-1338.

FINAL JUDGMENT

(Filed February 26, 1974)

This action came on to be tried before the Court, and the evidence adduced by the parteis having been heard, and the Court having made its Findings of Fact and Conclusions of Law, and a Memorandum and Order having been duly rendered, it is hereby

Ordered that the Defendant, Western Gillette, Inc. pay to the persons named below the amounts set forth opposite their names in the far right hand column (V); provided, however, that no such payment shall be due any discriminatee, until such discriminatee shall have met the conditions of accepting over-the-road employment as set forth in the Memorandum and Order rendered contemporaneously herewith:

I. Name of Discriminatee	II. Individual Discriminatees Actual Earnings* Through July 17, 1973	III. Estimated Line Driver Pay (II × 1.56)	IV. Line Driver Pay Less 10% (III − 10%)	V. Amount Due Discriminatee (IV − II)
Raymond O'Neal	$55,427.03	$86,466.17	$77,819.55	$22,392.52
George Williams	$44,841.64	$69,952.96	$62,957.66	$18,116.02
Luther Thomas	$54,110.95	$84,413.08	$75,971.77	$21,860.82
Alfonso Adams	$49,645.08	$77,446.32	$69,701.69	$20,056.61
Thomas Lindley	$49,726.72	$77,573.68	$69,816.31	$20,089.59
I. V. Phlegm	$57,137.51	$89,134.52	$80,221.07	$23,083.56
Frank Fountain	$39,208.98**	$61,166.01	$55,049.41	$15,840.43
Essie McGregor	$58,137.32	$90,694.22	$81,624.80	$23,487.48
Herman Carrier	$48,591.42	$75,802.62	$68,222.36	$19,630.94
John Roberson	$55,432.19	$86,474.22	$77,826.80	$22,394.61
Roy Rodriguez	$44,607.21	$69,587.25	$62,628.53	$18,021.32
Henry McTear	$47,570.79	$74,210.43	$66,789.39	$19,218.60
Leonard Ramirez	$37,346.57***	$58,260.65	$52,434.59	$15,088.02
Oliver Sabala	$43,612.18	$68,035.00	$61,231.50	$17,619.32
Lewis Norman	$42,085.68	$65,653.66	$59,088.29	$17,002.61
Robert Clark	$39,176.99	$61,116.10	$55,004.49	$15,827.50
Charles O'Neil	$37,701.07	$58,813.67	$52,932.30	$15,231.23
Grover Williams	$35,628.04	$55,579.74	$50,021.77	$14,393.73
Edgar Williams	$32,556.99	$50,788.90	$45,710.01	$13,153.02
Deford Bailey	$20,867.33	$32,553.03	$29,297.73	$ 8,430.40
Claudell Lipscomb	$20,682.31	$32,264.40	$29,037.96	$ 8,355.40
Ormogene Dosty	$15,940.58	$24,867.30	$22,380.57	$ 6,439.99
Ellsworth Pinkins****				

*Adjusted to 6/3/68 or "Rightful Place" Seniority Date whichever is later.

**Adjustment to exclude 11 months of earnings during which discriminatee's vision would have prevented his working as an over-the-road driver.

***Reflects earnings only through July 1972 when discriminatee transferred to over-the-road in Salt Lake City, Utah.

****No back pay due since no jobs have been available in Houston since discriminatee was qualified.

It Is Further Ordered that the costs of this action are taxed against the Defendants and allocated as follows: One-half (½) to be paid by the Company, the other one-half (½) to be paid equally by the three union organizations. Included in such costs, but not limited thereto, are the following:

Expert witness fee for Dr. Richard A. Tapia . . . Three Thousand Dollars ($3,000.00), plus interest at the rate of 6% from the date of entry of this Judgment. Attorneys' Fee to Mandell & Wright . . . Twelve Thousand Five Hundred Dollars ($12,500.00), plus interest at the rate of 6% from the date of entry of this Judgment. Attorneys' Fee to Rosenthal & Rosenblum . . . Thirty-Five Thousand Dollars ($35,000.00), plus interest at the rate of 6% from the date of entry of this Judgment. Such other and further costs which are ordinarily taxable in litigation of this nature.

Dated: February 26, 1974.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX G.

Title 42, United States Code.

§ 1981. *Equal rights under the law*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 2000e-2. *Unlawful employment practices—Employer practices*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title 42, United States Code.

§ 2000e-5. *Enforcement provisions—Power of Commission to prevent unlawful employment practices*

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Supreme Court, U. S.
FILED
MAR 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1060

WESTERN GILLETTE, INC.,
Petitioner,

v.

OLIVER I. SABALA, Individually and on behalf of all others similarly situated, and LEONARD M. RAMIREZ,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 516 F.2d 1251, and is reproduced in the Appendix to the Petition for Certiorari (App. pp. A-1-44).

The Opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 362 F.Supp. 1142; and the Remedial Order is reported at 371 F.Supp. 385. Both are reproduced in the Appendix (App. pp. 47-98).

JURISDICTION

Respondents do not question the jurisdiction of this Court as set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are, as set forth in the Petition, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*

QUESTIONS PRESENTED

1

The questions presented by Petitioner are as follows:

Whether unlawful standards were used in the formulation of the "rightful place" seniority awarded the discriminatees for the purpose of remedial relief.

2

Whether the priority granted discriminatees as to future over-the-road jobs constitutes proscribed discrimination.

3

Whether the standards used to fix rights of discriminatees to back pay permit awards to individuals not legally entitled thereto.

4

Whether a legally invalid formula has been used to compute the award of back pay recoverable by discriminatees.

STATEMENT OF THE CASE

Petitioner's statement is in disregard of the operative principle of review that the evidence is to be viewed and construed in a manner favorable to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment rendered below.

The trial court heard abundant testimony regarding the factual underpinnings of its Opinions and held, *inter alia*, that petitioner was primarily responsible for the original hiring discrimination, and accordingly assessed all back pay liability against petitioner. The trial court's assessment of responsibility was bottomed upon its review of twenty-five sworn answers to interrogatories propounded and filed by petitioner, exhaustive examination of respondents' expert[1] and petitioner's two experts,[2] review of evidence documenting petitioner's subjectivity in awarding preferred over-the-road positions,[3] testimony taken, and, perhaps most importantly, statistical evidence supporting presumptions and conclusions of the court that there existed "original hire" and "lock-in" discrimination at Western Gillette, Inc.[4]

Nowhere, as Petitioner asserts, is there any evidence that "[T]he Court of Appeals *mistakenly* concluded that the district court had found the Southern Conference Area was

---

1. Dr. Tapia.

2. Drs. Otto and Lawless.

3. Respondents' assertions throughout trial was that if in fact, any of them became road drivers, petitioner would use the "thirty day probationary rule" to fire them – that is that during the first thirty days as an over-the-road driver, one could be fired with or without cause. Petitioner vehemently denied this; Plaintiff's exhibit 4 at Par 4, p. 1264 of the Appendix to the Record, belies their denial.

4. Petition for Certiorari, pp. A-64-67.

the 'universe of job opportunities' for the purpose of fixing 'carry-over' constructive seniority because of 'modified seniority system' provisions in the applicable Road Driver bargaining agreements"[5] (emphasis added). In fact, footnote 12 of the Petition for Certiorari alludes to *no* supporting evidence or law in support of this assertion which is one of the touchstones of the Petition;[6] petitioner's bare assertions are simply untrue.[7]

Petitioner complains that back-pay was improperly computed. The Circuit Court had before it the Record, ignored by petitioner, and it properly concluded, as it had previously, that there is no unique formula by which back-pay can be computed.[8] The trial court's method for computation was appropriate to the circumstances and facts of the case. The formula for computation was one, as petitioner indicates, selected by the Court as the best suited to remedy the wrong from among a varity of formulae advanced by both petitioner and respondents. The Circuit Court correctly chose not to invade the proper province of the trial court to determine what was fair, just and equitable under the circumstances.

Petitioner misconstrues the trial court's decisions when it suggests that the awards of "make-whole" seniority were made without regard to the facts. In fact, the seniority awards were predicated in large part upon the answers to interrogatories filed by Petitioner. Based upon those answers and upon testimony taken at trial, the court excluded two class members, Messrs. Ellison and

---

5. Petition for Certiorari, p. 9.

6. Petition for Certiorari, p. 9, n. 12, pp. 9-10.

7. Petition for Certiorari, pp. A-88-89.

8. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).

Golden[9]; other putative class members were excluded by virtue of their answers to the interrogatories propounded by petitioner.

Finally by allusion, petitioner suggests that the seniority relief granted constitutes proscribed "reverse discrimination". The petitioner attempts by this allusion, and more directly in argument, to raise questions before this Court that were not before the court from which this writ is taken.

REASONS FOR DENYING THE WRIT

1

The District Court did not utilize unlawful standards in the formulation of "rightful place" seniority.

It is now well settled that federal courts dealing in the area of employment discrimination are mandated, upon a showing of liability, to "fashion such relief as the particular circumstances of the case may require to effect restitution, making whole insofar as possible the victims of racial discrimination . . .". *Franks v. Bowman Transportation Co.*, 424 U.S. 747, ; 47 L.Ed.2d 444, 461 (1976). It is equally well established that a seniority remedy is an integral part of the "make whole" purpose of Title VII; and, as this Court has recognized, "adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that he would have had . . . [but for discrimination . . .]". Id at 461-462

9. Petition for Certiorari, pp. A-84-85. Note also that Mr. Pinkins achieved no rightful place seniority because there had been no road jobs available in Houston since the date he had become qualified.

Nor can it be denied that the shaping of an appropriate remedy is within the sound discretion of the district court whose judgment must be guided "by sound legal principles". *Albemarle Paper Company v. Moody,* 422 U.S. 405, 416 (1975).

Under these broad guidelines, the petitioner's challenges to the district court's calculation of "rightful place" seniority are wholly unfounded. Here, the petitioner's attack is basically two pronged. First, they contend that the district court erred in determining when the "discrimination began"; and, second, the district court incorrectly determined the "road jobs which would have been available to class members" (Petition For Certiorari, p. 16). In so doing, petitioner has alleged that the district court's calculation of "rightful place" seniority is squarely in conflict with this court's decision in *Franks* and *Abermarle.* Nothing could be further from the truth. "Rightful place" seniority dates have consistently been interpreted by the lower courts as embodying two concepts. First, the date upon which the employee became qualified for the job in question; and, second, the next date after qualification upon which a job became available to which the discriminatee would have acceeded "but for" the discrimination. See, e.g., *Sagers v. Yellow Freight System,* 529 F.2d 721 (5th Cir. 1976). After twenty-two days of bifurcated trial, during which the district court heard testimony from thirty-three witnesses including seven officers or employees of the company, the court carefully determined each individual class member's qualifications date and their "rightful place" seniority dates (See, n.9, *supra*).

Yet the petitioner asserts that the district court engaged in a presumption that all class members would have taken the first job available to them after their qualification date. The petitioner's statement that the district court engaged

in this "presumption" (Petitioner for Certiorari p. 17) is simply not supported by the record and is misleading to this Court. What is true, is that the district court, based upon sworn answers to interrogatires by each class member and trial testimony, determined *which* of the class members would have taken the first available road job after they became qualified. Thus, this determination was not a presumption at all, but a conclusion reached by the district court which was supported by the evidence.[10] These putative class members who the court concluded would not have accepted the jobs were excluded from the class.

Additionally, the petitioner alleges that the district court erred in determining that the class members could have obtained road jobs elsewhere than the Houston terminal. Considering the record in this case, this argument is specious. The touchstone for fashioning any remedy, in a case such as this, is a determination by the court as to what the universe of job opportunities is for the class discriminatees. Of course, this determination must be based on the record. Here, the record defies petitioner's assertions and overwhelmingly supports the district court's conclusion that, for those who would have taken them, road driving jobs in the Southern Conference would have been available to them but for the proscribed discrimination.[11] (R. 1117-1119, 1597, 1719-1920). On this

10. Many of the class members qualification dates were stipulated to by petitioner in open court. Those whose qualification dates were not the subject of stipulation were determined by the court after hearing the testimony of Robert Hoover, the company employee charged with administering the company's road driving tests. Tr. II, R. 1052-1055. [For the Court's convenience, all references to the record of the first trial, which was the liability trial, shall be denominated by Tr. I., and the second trial, which was the remedy trial, as Tr. II]

11. Of course, the modified system seniority was another factor considered by the district court in making this determination. (Petition for Certiorari, p. A-89).

basis, it cannot be gainsaid that the district court fulfilled its obligation to fashion a decree which would, as far as possible, place the injured party "as near as may be, in the situation he would have occupied if the wrong had not been committed". *Wicker v. Hoppock*, 6 Wall 94, 99. Quite simply, the evidence supports the remedy.

Finally, Petitioner asserts that this Court should grant certiorari because the district court failed to consider, in computing "rightful place" seniority, the impact it might have on non-minority drivers who have transferred to the road.[12] However, this issue was not raised on appeal and, accordingly was not considered by the Fifth Circuit.[13] For this reason, Respondents submit that certiorari should not be granted on this issue. See, e.g. *Franks*, *supra*, n.38.

2

The "make-whole" seniority relief granted some class members does not constitute "reverse discrimination".

As to the ten class members who testified that they would have taken jobs anywhere in the Southern Conference, Petitioner concedes that there "may be some justification" for the seniority relief granted.[14] However, Petitioner vigorously challenges the court's authority to afford job opportunities in the Southern Conference to those discriminatees who had indicated that they were interested only in Houston based over-the-road jobs.

---

12. Petition for Certiorari, p. 20. Petitioner also alleges that there is a conflict in the circuits on this issue. While Respondents do not believe that an irreconcilable conflict exists between the circuits; we would submit that this contention was resolved by this court's opinion in *Franks*, *supra*.

13. Petition for Certiorari, pp. A-1-44.

14. Petition for Certiorari, p. 24.

Testimony at trial indicated that there was little likelihood that there would be any jobs available in Houston in the foreseeable future.[15] Consistent with his mandate, the trial court fashioned a remedy calculated to "make whole" so far as possible, the victims of impermissible racial discrimination. Only by affording all entitled class discriminatees an over-the-road job opportunity could the court meet its mandate. In the truest sense, the relief granted the Houston discriminatees was consistent with the circumstances of the business at the time. Employees at Houston were and are on layoff; road drivers on layoff are entitled to "bump" into any other of petitioner's Southern Conference terminals under the "modified system seniority", displacing road drivers with lesser seniority at the transferee terminal. There was no way to take a "Houston only" view of the matters presented to the court and counsel for petitioner recognized this. Discussing the materiality of evidence relating to minority employees elsewhere in the petitioner's system, counsel for petitioner made the following statement to the court:

> Mr. Russell: There are several reasons why *I believe it is material and pertinent,* Your Honor, first of all, in the narrow area, *because we are involved with the modified seniority system.*
>
> *It is impossible to isolate this problem,* even as of this class, *to Houston,* in our judgment, in its turn. (emphasis supplied).[16]

Respondents urge that the trial court's grant and the circuit court's affirmance of "Rightful Place" seniority to

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15. Tr. I. R. 961-964. As a matter of fact, the over-the-road operation at Houston was eliminated subsequent to the Circuit Court's opinion.

16. Tr. I R. 513.

both the Houston and Southern Conference discriminatees is wholly consistent with this Courts pronouncements regarding remedies.[17]

If the red herring of "reverse discrimination" is not wholly dispelled by the majority opinion in *Franks, supra,* the proper approach to dealing with the conflicting interests of encumbent employees is set out in Mr. Justice Burger's concurring and dissenting opinion.[18] *Franks, supra* at 471. Also see *McDonald v. Santa Fe Transportation Company* U.S. , 12 FEP Cases 1577 (1976).

3

The Eligibility of Class Plaintiffs For Back Pay Has Not Been Determined On the Basis of Invalid Standards

As framed, Petitioner's question No. 2 makes statements which are not supported by the record. In attempting to convince this Court that certiorari should be granted on this issue, Petitioner points to decisions of the fourth and sixth circuits[19] as being directly in conflict with the position taken by the district and circuit court in determining which class members should be eligible for back-pay. However, a careful reading of those opinions reveal that they are not in conflict. Neither the sixth circuit in *Thornton* or the fourth circuit in *Hairston* held that the district court must hear testimony from each and every class member about why they did not make a "pre-litigation" inquiry about a road job. What they did hold is that a showing of a "pre-

17. Sea, *Franks v. Bowman Transportation Co., supra,* n. 41.

18. Respondents have consistently urged that "front-pay" is also a necessary ingredient to the "make whole" mandate of Congress and the Courts. Petition for Certiorari, p. A-36.

19. 6th Cir: *Thornton v. East Texas Motor Freight,* 497 F.2d 416 (1974); 4th Cir: *Hairston v. McLean Trucking Co.,* 520 F.2d 226 (1975).

litigation" inquiry or an explanation why such an inquiry was not made from each class member, *may* be a matter which the district court, in its discretion should consider.[20]

For this reason, respondents submit that there is no true conflict in the circuits on this issue, and, in fact, a common thread binds all of the circuit opinion and that is, that the district court must be given broad discretion in determining how much significance should be attached to this factor. As the record in this case reveals, the district court properly exercised its discretion in not allowing the absence of a "pre-litigation" inquiry to operate[21] to diminish or

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20. The fourth, fifth and sixth circuits have all recognized the problem; and have dealt with it in a strikingly similar manner. That is, that the district court must be given wide latitude in determining the weight which should be given to the absence of a "pre-litigation" inquiry by any individual discriminatee. This conclusion is bottomed on a judicial recognition that the evidence may well establish the futility of inquiry; See, *Hairston, supra.;* or it may establish that such an inquiry would not have been futile. See, *Thornton, supra.* Of course, where the evidence clearly shows that it would not have been a futile gesture, then a showing of a pre-litigation inquiry might be relevant. However, the petitioner made no such showing here and the record supports the district court's position that such an inquiry did not need to be made of each class member; nor should back-pay be conditioned upon a showing of a pre-litigation inquiry. And, in this case, the court of appeals correctly recognized that the district court must be given "wide discretion" in determining whether lack of a showing of a pre-litigation inquiry should be utilized in determining the eligibility of individual class members for back-pay. See, Petition for Certiorari, p. A-32, n. 13.

21. We note that petitioner asserts that the lower court did not follow the guidelines of this court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) by not requiring that an "application" be made for the job in question. This position is absurd for two reasons. First, this Court's pronouncement in *McDonnell Douglas* related only to the establishment of a prima facie case of discrimination; and, second, this Court expressly recognized that these criteria were not "necessarily applicable in every respect to different factual situations" *McDonnell Douglas,* supra at 802, n. 13. Obviously, the record in this case mandates that this criteria, if it literally applies in all back-pay situations, be modified.

otherwise affect the individual discriminatee's back-pay entitlement.

4

The Formula Approved By the Court Below For the Back-Pay Due Class Member Is Valid

"The foregoing explanations may be somewhat tedious."[22]

The Petitioner's attacks on the computation of back-pay are little more than circuitry calculated to confound this Court.

Petitioners refers the Court to the trial court's exhibit 1[23] and suggests that the exhibit demonstrates that a class member, Edgar Williams, would have earned less money as a road driver in his rightful place than a city driver. The suggestion is chicanery and untrue.

It is now well settled that, absent special or unusual cirstances, back-pay[24] and seniority relief[25] are appropriate remedies to effectuate the central purpose of the Act. The niceties of fashioning back-pay and seniority relief appropriate to the circumstances of each case are properly within the discretion of the trial court who is seized with a "keen appreciation" of the peculiar facts and circumstances of the case.[26]

From October 30, 1973, to November 9, 1973, virtually all of the testimony concerned the fashioning of appropriate

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22. Petition for Certiorari, p. 35.

23. Petition for Certiorari, p. A-100.

24. *Albemarle Paper Co. v. Moody, supra.*

25. *Franks v. Bowman Transportation Co., supra.*

26. *Albemarle Paper Co. v. Moody, supra* at 421-422.

relief to remedy the discrimination which had been established in the earlier, liability phase of the trial. The respondent's expert, Dr. Tapia, testified that there were four or five formulae by which back pay could be computed.[27] Drs. Lawless and Otto proposed other methods, and variations on Dr. Tapia's methods. The trial court, in its wisdom, chose to fashion a method of computation which adopted the best of the various methods, and addressed the various challenges raised by counsel for both petitioner and respondents. This Court should not disturb the circuit court's affirmance of the district court, whose opinion was based upon an intimate acquaintance with the nuances and subtleties of the facts and circumstances of this case.

CONCLUSION

Petitioner does not bring before this Court a substantial question of law, nor a question of law at all; rather they attempt, for the third time, to reargue facts which are not supported by the record.

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of any other court of appeals on the same matter.

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27. Tr. II. R. 654.

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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